14-723

No. ___

IN THE

Supreme Court of the United States

ROBERT MONTANILE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition presents a single question about the meaning of an important remedial provision of the Employee Retirement and Income Security Act of 1974 ("ERISA"). Eight of the thirteen circuits have squarely and openly disagreed over the question presented. The result is a widely acknowledged 6-2 circuit split. In a recent invitation brief, the United States acknowledged the (then) 5-2 circuit split and endorsed the *minority* position. Brief for the United States as Amicus Curiae, Thurber v. Aetna Life Ins. Co., 134 S.Ct. 2723 (May 6, 2014) (No. 13-130). The government recommended denial, however, solely on vehicle grounds. *Id.* at 15–20. The petition was denied.

The question presented by this petition is:

Does a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seek "equitable relief" within the meaning of ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), if the fiduciary has not identified a particular fund that is in the participant's possession and control at the time the fiduciary asserts its claim?

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INTRODUCTION

There is a well-recognized and intractable circuit split involving eight of the thirteen circuits over the question presented. *See infra* 15–17. Certiorari is warranted for that reason alone. Sup. Ct. R. 10(a).

But the question presented is worthy of review for other reasons as well. It turns entirely on the proper interpretation of this Court's line of ERISA section 502(a)(3) cases. Six circuits read those cases one way. Two circuits, joined by the United States Solicitor General and the United States Department of Labor, read those cases to mean precisely the opposite. Thus, one group of circuits has *necessarily* decided "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). And for precisely the reasons articulated by the United States in a recent invitation brief, the decision below is on the wrong side of that conflict. *See infra* 17–18 (discussing Brief for the United States as Amicus Curiae, Thurber v. Aetna Life Ins. Co., 134 S.Ct. 2723 (May 6, 2014) (No. 13-130) ("U.S. Br."); *see also infra* 3–6 (discussing this Court's prior ERISA section 502(a)(3) cases).

The time for resolution is now. As leading advocates on both sides of this issue have made clear, the question presented is of extraordinary importance to employers and workers across the country and requires a uniform national answer. *See infra* 18–22. And, unlike in *Thurber*, there is no "logically antecedent issue" or other vehicle problem in this case that "could prevent the Court from deciding the . . . question presented." U.S. Br. 5.

The petition should be granted.

OPINIONS BELOW

The opinion of the Eleventh Circuit in this case (Pet. App. 1–18) is unreported. The district court's summary-judgment decision (Pet. App. 19–45) is unreported. The 2-1 decision of the Eleventh Circuit in *AirTran Airways, Inc. v. Elem*, by which the panel in this case was bound, (Pet. App. 46–76) is reported at 767 F.3d 1192. The order denying rehearing and rehearing *en banc* in *AirTran* (Pet. App. 77–78) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on November 25, 2014. Pet. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, as amended, provides in relevant part:

> (a) Persons empowered to bring a civil action.
>
> A civil action may be brought—
>
> ***
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to

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[1] For the convenience of the Court, Petitioner has reproduced in the Appendix the two relevant *AirTran* decisions.

redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

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STATEMENT OF THE CASE

This petition presents a single question about the meaning of an important remedial provision of ERISA. That statutory provision, which has already resulted in several published decisions by this Court, authorizes a participant, beneficiary, or fiduciary to obtain an injunction or "other appropriate equitable relief" to redress statutory violations or to enforce the terms of an ERISA plan. 29 U.S.C. § 1132(a)(3).

In an effort to clearly explain the need for further review, this petition first provides some necessary statutory and factual background. It then recounts the relevant procedural history of this case.

A. Statutory Background

ERISA is a landmark federal statute designed "to promote the interests of employees and their beneficiaries in employee benefit plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (citations omitted). It was drafted to include not only pension plans, 29 U.S.C. § 1002(2), but also welfare plans, 29 U.S.C. § 1002(1). Today, ERISA welfare plans are the primary source of health, life, and disability insurance for millions of Americans.

Section 502(a) of ERISA sets forth the exclusive remedies that are available to a civil litigant under the statute. *See* 29 U.S.C. § 1132(a). The most controversial part of ERISA's remedies provisions is section

502(a)(3)(B), which authorizes a civil action to recover "appropriate equitable relief." 29 U.S.C. § 1132(a)(3)(B).[2] That statutory phrase has already resulted in several decisions by this Court:

1. In 1993, this Court first interpreted the meaning of the words "appropriate equitable relief" in 29 U.S.C. § 1132(a)(3)(B). *See Mertens v. Hewitt*, 508 U.S. 248 (1993). In a 5-4 decision, the *Mertens* Court held that Congress intended the phrase to refer only to "those categories of relief that were typically available in equity." *Id.* at 256.

In 2002, this Court decided *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). In *Knudson*, an ERISA fiduciary whose plan had paid the medical bills of an injured participant sought "reimbursement" from that participant after she reached a monetary settlement with the responsible tortfeasor. *Id.* at 207. The proceeds of the settlement had been deposited directly into a special needs trust, which was not made a party to the litigation. *Id.* at 208. For that reason, the *Knudson* Court held that the fiduciary had no recourse against the participant personally. *Id.* at 210.

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[2] The meaning of the phrase "appropriate equitable relief" is not only controversial, but also of unique importance. Section 502(a)(3) is the only provision in ERISA that permits a fiduciary to seek monetary relief from a participant or beneficiary who has violated the terms of her ERISA plan. And it is the only provision in ERISA that permits a participant or beneficiary to seek individualized monetary relief to remedy a statutory violation. *See generally* Victor O'Connell & Peter K. Stris, *ERISA & Equity*, 29 ABA J. LAB. & EMP. L. 125, 133–36 (2013).

In 2006, this Court decided *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006). *Sereboff* involved the same factual scenario as *Knudson* but with one critical difference: the funds sought by the fiduciary were paid to the named defendants and segregated by agreement of the parties pending the resolution of litigation. *Id.* at 360. The defendants argued that the "reimbursement" sought by the fiduciary was neither available as a restitutionary equitable lien (because the segregated settlement funds could not be traced back to the monies paid by the plan to cover the participant's medical bills), Brief of Petitioners at 17–23, Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356 (Jan. 19, 2006) (No. 05-260), nor as an equitable lien by agreement (because such a contractual remedy was not typically available in pre-merger courts of equity), *id.* at 24–27.

The *Sereboff* Court disagreed. It held that an equitable lien by agreement *was* typically available as a remedy in pre-merger courts of equity. *Sereboff*, 547 U.S. at 368. And, as such, there was no requirement that the fiduciary trace the settlement fund back to the monies paid by the plan to cover the participant's medical bills. *Id.* at 365.

The *Sereboff* Court did not, however, overrule the core teaching of *Knudson*. Indeed, because the settlement funds in *Sereboff* were being held in escrow pending resolution of the litigation, the Court expressly noted that the "impediment to characterizing the relief in [*Knudson*] as equitable [was] not present [because the plaintiff] sought its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the [defendants'] assets generally, as would be the case with a contract action at law." *Id.* at 362–63.

In 2013, this Court decided *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013). In *McCutchen*, this Court—for a third time—evaluated the viability of a claim by an ERISA fiduciary whose plan had paid the medical bills of an injured participant that sought "reimbursement" from that participant after she reached a monetary settlement with a tortfeasor. *Id.* at 1543. As in *Sereboff* (and unlike in *Knudson*), the funds on which the fiduciary wished to place an equitable lien were indisputably in the possession of the defendants. *Id.*

In *McCutchen*, the defendants pressed an argument left open by the *Sereboff* Court—that the relief sought by the fiduciary was not "appropriate" because it contravened equitable common fund and make whole doctrines. *See* Brief for Respondents, US Airways, Inc. v. McCutchen, 133 S. Ct. 36 (Oct. 18, 2012) (No. 11-1285). The *McCutchen* Court rejected that argument. It held that the default equitable doctrines relied on by defendants will not apply under ERISA if they are disclaimed by the relevant plan documents. *McCutchen*, 133 S. Ct. at 1546.

Like the *Sereboff* Court, the *McCutchen* Court did not purport to overrule the core teaching of *Knudson*. To the contrary, it emphasized that the fiduciary in *McCutchen* (like the fiduciary in *Sereboff*) sought "equitable relief" because it claimed "'specifically identifiable funds' within the [defendants'] control. . . ." *Id.* at 1545 (emphasis added).

2. In the wake of *Mertens*, *Knudson*, *Sereboff*, and *McCutchen*, litigation by ERISA fiduciaries against plan participants often turns almost entirely on one critical question: may an ERISA fiduciary enforce an equitable lien against a defendant's general assets when specifically identified funds are no longer in his or her

possession? That question is exceptionally important and arises frequently in various types of ERISA cases. To appreciate the magnitude of the stakes involved, it is necessary to understand the three major settings in which the question presented is often, as in this case, outcome determinative: (1) healthcare cases, (2) disability cases, and (3) pension cases.

Healthcare cases. ERISA plans often pay the medical expenses of participants or beneficiaries who are injured in an accident. Most plans contain terms requiring those benefits to be repaid if the recipient later obtains a recovery from a responsible third party. Many plans expressly disclaim application of the common fund doctrine (*i.e.*, the plan will free-ride on the work of the participant's personal injury attorney) and authorize first-dollar recovery (*i.e.*, the plan will be reimbursed 100% even if the injured participant will receive nothing).[3] When there is a dispute over the existence or amount of the plan's lien, a fiduciary must act promptly to protect its interest. Otherwise, some or all of the disputed monies may be spent in good faith before resolution of the parties' dispute. In such cases, the question arises: can an "equitable lien" be enforced without showing that the funds on which the lien was placed remain in the defendant's possession?

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[3] Such provisions can be terribly unfair. *See, e.g.*, Vanessa Fuhrmans, *Accident Victims Face Grab for Legal Winnings*, WALL ST. J., (Nov. 7, 2007, 11:59 PM), http://www.wsj.com/news/articles/SB119551952474798582. As such, they are unenforceable under the law of most states. *See generally* Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 LOY. U. CHI. L.J. 49 (2008).

Disability cases. ERISA plans often wish to require disability benefits to be repaid if a beneficiary receives Social Security Disability Income ("SSDI"). But section 407(a) of the Social Security Act shields SSDI benefits from attachment. *See* 42 U.S.C. § 407(a). To avoid running afoul of that prohibition, many ERISA plans are written to deem disability benefits as "overpayments" subject to recoupment if SSDI is received. Under these plans, when a plan participant becomes disabled, is paid benefits, and—months or years later—receives SSDI, the plan seeks recoupment for its "overpaid" benefits, which by that time have been spent on living expenses. Again, the question arises: can an "equitable lien" be enforced without showing that the funds on which the lien was placed remain in the defendant's possession?

Pension cases. A third common fact pattern arises in pension cases. Years after pension benefits are paid, a plan discovers that the benefit payments were too high as a result of a miscalculation by the plan. The plan's terms authorize recoupment. As one can imagine, the result of seeking such recoupment can be extremely harsh for individuals who have exhausted the funds that they honestly believed they were entitled to spend. Once again, the question presented is implicated.

3. Prior to this case, five circuits had held that an ERISA fiduciary may enforce an equitable lien against a defendant's general assets even if the fund has been dissipated, whereas two circuits had held that it may not. *Compare Cusson v. Liberty Life Assurance Co.*, 592 F.3d 215 (1st Cir. 2010) (plan may collect from defendant even though the fund was no longer in the defendant's possession or control), and *Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654 (2d Cir. 2013) (same), and *Funk v. CIGNA Grp. Ins.*, 648 F.3d 182 (3d Cir. 2011) (same),

and *Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009) (same), and *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614 (7th Cir. 2008) (same), *with Treasurer, Trustees of Drury Indus., Inc. Health Care Plan & Trust v. Goding*, 692 F.3d 888 (8th Cir. 2012) (when the defendant is no longer in possession of a fund, a Plan cannot enforce an equitable lien), and *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012) (same).

Advocates on both sides have implored this Court to intervene and resolve the circuit split. *See, e.g.*, Petition for a Writ of Certiorari, First Unum Life Ins. Co. v. Bilyeu, 133 S.Ct. 1242 (October 26, 2012) (No. 12-526) (filed by plan fiduciary); Petition for a Writ of Certiorari, Thurber v. Aetna Life Ins. Co., 134 S.Ct. 2723 (July 26, 2013) (No. 13-130) (filed by plan participant).

Last year, this Court called for the views of the Solicitor General. *Thurber v. Aetna Life Ins. Co.*, 134 S. Ct. 381 (2013). In its invitation brief, the government acknowledged the existence of a (then) five-to-two circuit split. U.S. Br. at 6–9. It proceeded to explain in detail why the position of the majority is wrong because it directly contravenes *Knudson*, see U.S. Br. at 9–14, based on a fundamental misinterpretation of *Sereboff*, see U.S. Br. at 14–15.

The government recommended denial, however, on vehicle grounds. *See* U.S. Br. at 6–20 ("The first question presented implicates a conflict in the courts of appeals, but this petition is a poor vehicle for resolving it.") (initial capitalization removed); *id.* at 15–20 (explaining the specific vehicle problems present in *Thurber*). The *Thurber* petition was subsequently denied. *Thurber v. Aetna Life Ins. Co.*, 134 S. Ct. 2723 (2014).

B. Factual Background

On December 1, 2008, Petitioner Robert Montanile was seriously injured when a drunk driver ran a stop sign and struck his automobile. Pet. App. 6. Mr. Montanile underwent lumbar spinal fusion surgery and other treatment to alleviate his pain and loss of function. Pet. App. 6. He requires ongoing medical care and continues to suffer pain and physical limitations. Brief of Appellant at 5, Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan (May 27, 2014) (No. 14-11678) ("Montanile's C.A. Brief"). The National Elevator Industry Health Benefit Plan ("National Elevator Plan" or "Plan"), a billion-dollar multiemployer ERISA plan, paid Mr. Montanile's initial medical expenses in the amount of $121,044.02. Pet. App. 6; National Elevator Industry Health Benefit Plan: Form 5500 Annual Report at `48–50 (2009), *available at* https://efast.dol.gov/portal/app/disseminate?execution=e1s1 (to access the relevant document, use the Form 5500 Filing Search and search for Acknowledgement ID: 20101027094142P04000062234 3003) (listing approximately $1 billion in assets and over 500 participating employers).

Mr. Montanile retained counsel to sue the drunk driver and eventually settled his claims for a total of $500,000. Pet. App. 6. Out of that amount, Mr. Montanile paid his attorneys a $200,000 contingency fee and $63,788.48 in expenses. Pet. App. 6. Respondent Board of Trustees of the National Elevator Industry Health Benefit Plan ("Trustees"), which operates and administers the Plan, then asserted a right to be reimbursed the $121,044.02 the Plan had paid to Mr. Montanile's medical providers. Pet. App. 7. The Trustees sought reimbursement on a "first dollar" basis—*i.e.*, without any adjustment for Mr. Montanile's fees and

expenses or for the fact that he was not made whole. Pet. App. 7.

The Trustees relied on the following provision of the Plan's Summary Plan Description (the "Reimbursement Provision"):

> The Plan has a right to first reimbursement out of any recovery. Acceptance of benefits from the Plan for an injury or illness by a covered person, without any further action by the Plan and/or the covered person, constitutes an agreement that any amounts recovered from another party by award, judgment, settlement or otherwise, and regardless of how the proceeds are characterized, will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan due to the injury or illness and without reduction for attorneys' fees, costs, expenses or damages claimed by the covered person, and regardless of whether the covered person is made whole or recovers only a part of his/her damages.

Pet. App. 5–7.[4]

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[4] In the lower courts, Mr. Montanile argued that the Reimbursement Provision was not enforceable as a term of the National Elevator Plan because the Summary Plan Description did not qualify as the written instrument required by 29 U.S.C. § 1102. The Court of Appeals disagreed, holding that the terms of the Summary Plan Description "are enforceable, pursuant to § 1132(a)(3) because (1) no other document lays out the rights and obligations of plan participants and (2) the Trust Agreement contemplated the rights and obligations would be set forth in a separate document." Pet. App. 15. Mr. Montanile does not seek further review of the Court of Appeals' decision with respect to the enforceability of the Reimbursement Provision.

Mr. Montanile retained experienced ERISA attorney Brian S. King, who tried to negotiate a settlement with the Trustees for eight months. Montanile's C.A. Brief 6. When the parties reached an impasse, Mr. King requested that the Trustees either accept his final offer or file suit. Montanile's C.A. Brief 6. Mr. King told the Trustees that he would release the remaining settlement funds to Mr. Montanile if they failed to respond within 14 days. Montanile's C.A. Brief 6. After nearly a month passed with no response, Mr. Montanile asked his lawyer to distribute the rest of the funds to him, and Mr. King complied. Montanile's C.A. Brief 6–7.

Mr. Montanile then used the money to pay Mr. King's legal bills and to care for himself and his 12-year-old daughter. Montanile's C.A. Brief 7. Several months later, when significantly less than the $121,044.02 sought by the Trustees remained in Mr. Montanile's possession, the Trustees filed this lawsuit. Montanile's C.A. Brief 7.

C. Proceedings Below

The Trustees sued Mr. Montanile under 29 U.S.C. § 1132(a)(3) seeking reimbursement of benefits that the Plan paid to his medical providers. Pet. App. 7. Section 1132(a)(3) authorizes an ERISA fiduciary to seek "appropriate equitable relief" to "enforce the terms of the plan." 29 U.S.C. § 1132(a)(3). Relying on *Sereboff*, the Trustees sought reimbursement in the form of an equitable lien by agreement to "enforce the terms of the [National Elevator Plan]." Montanile's C.A. Brief 12.

After exchanging Rule 26(a) disclosures, the parties cross-moved for summary judgment. Montanile's C.A. Brief 12–13. Mr. Montanile opposed the Trustees' motion on the grounds that the reimbursement they sought did not constitute "appropriate equitable relief" because the

funds on which they wished to assert an equitable lien by agreement had been dissipated. Pet. App. 8. The district court acknowledged that "*Sereboff* did not address the issue of a beneficiary's dissipation of assets because the funds there were placed in a separate account through the duration of the case" and that "[t]he Eleventh Circuit has similarly not had occasion to address the issue of dissipation." Pet. App. 40. Nevertheless, believing that it was following "the overwhelming majority of circuit courts," the district court granted summary judgment to the Trustees. Pet. App. 40.

Mr. Montanile timely appealed. Pet. App. 9. He argued, in relevant part, that 29 U.S.C. § 1132(a)(3) authorizes equitable relief only to the extent available at common law. Montanile's C.A. Brief 15. And, at common law, an equitable lien by agreement could be enforced against specific property within the current possession and control of a debtor, but not against his general assets. Montanile's C.A. Brief 15. Because Mr. Montanile's settlement fund was dissipated in good faith prior to the initiation of this lawsuit, the magistrate judge erred in granting summary judgment to the Trustees and should have been reversed. Montanile's C.A. Brief 15.

After the parties had fully briefed Mr. Montanile's appeal, a divided three-judge panel of the Eleventh Circuit issued its decision in *AirTran Airways, Inc. v. Elem*. Pet. App. 46–76. In *AirTran*, the panel majority squarely decided the question presented, expressly adopting the position of the First, Second, Third, Sixth, and Seventh Circuits and rejecting the position of the Eighth Circuit, Ninth Circuit, and federal government. Pet. App. 53–54. Judge Martin dissented. *See* Pet. App. 65 (Martin, J., dissenting) ("Supreme Court precedent

makes clear that a plaintiff proceeding in equity to recover funds from a defendant must, at a minimum, show that those funds are presently in the defendant's possession.").

Shortly thereafter, the *AirTran* defendants retained undersigned counsel and timely petitioned for rehearing *en banc*. *See* Petition for Rehearing En Banc, AirTran Airways Inc. v. Elem., 767 F.3d 1192 (October 14, 2014) (No. 13-11738). In that petition, the *AirTran* defendants analyzed the existing circuit split and argued that the panel decision conflicted with both Supreme Court and Eleventh Circuit precedent.

While the *AirTran* petition for rehearing *en banc* was pending, another Eleventh Circuit panel heard oral argument on Mr. Montanile's appeal. Less than one week after hearing oral argument, that panel rejected Mr. Montanile's arguments and affirmed the decision below. Pet. App. 2.

The *Montanile* court noted that Mr. Montanile's primary argument "is now foreclosed by our recent holding in [*AirTran*]." Pet. App. 11. Indeed, after describing the *AirTran* holding, that funds are "specifically identifiable" and dissipation cannot "destroy the lien that attached" beforehand, the court concluded: "This holding binds our decision here. Accordingly, the Board can impose an equitable lien on Montanile's settlement, even if dissipated . . . ." Pet. App. 11.

On December 2, 2014, the petition for rehearing *en banc* in *AirTran* was denied. Pet. App. 77.

This petition followed.

REASONS FOR GRANTING THE PETITION

This petition presents a textbook case for further review. There is a widely-recognized and intractable circuit split involving eight of the thirteen circuits over the question presented. *See infra* 15–17. The decision below conflicts with relevant decisions of this Court. *See infra* 17–18. And, as leading advocates on both sides of this issue have made clear, immediate review is necessary because the question presented is exceptionally important and requires a uniform national answer. *See infra* 18–22.

I. As the United States Acknowledges, the Question Presented Has Divided the Circuits.

Prior to 2012, four circuits (the First, Third, Sixth, and Seventh) addressed the question presented: may an ERISA plan fiduciary enforce an equitable lien by agreement under 29 U.S.C. § 1132(a)(3) without first identifying a particular fund that is currently in the defendant's possession and control on which the lien may be enforced? Each of the initial four circuits to address the question agreed that its answer is yes. In chronological order, the four relevant decisions are: *Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614 (7th Cir. 2008), *Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009), *Cusson v. Liberty Life Assurance Co.*, 592 F.3d 215 (1st Cir. 2010), and *Funk v. CIGNA Grp. Ins.*, 648 F.3d 182 (3d Cir. 2011).

In 2012, two additional circuits (the Eighth and Ninth) addressed the question presented. These two circuits determined that the answer to the question presented is no. In chronological order, the two relevant decisions are: *Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083 (9th Cir. 2012), *cert.*

denied, 133 S.Ct. 1242 (2013), and *Treasurer, Trustees of Drury Industries, Inc. Health Care Plan & Trust v. Goding*, 692 F.3d 888 (2012), *cert. denied*, 133 S. Ct. 1644 (2013).

In so holding, they created a square and openly acknowledged 4-2 circuit split. *See, e.g., Bilyeu*, 683 F.3d at 1094 ("We recognize that a number of circuits have [held] that a fiduciary can assert an equitable lien even if the beneficiary no longer possesses the specifically identified funds. We are unpersuaded by the view of those other circuits.").

In 2013, the Second Circuit became the seventh court of appeals to address the question presented. *See Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654 (2d Cir. 2013), *cert. denied*, 134 S.Ct. 2723 (2014). The Second Circuit expressly "recognize[d] the existence of a Circuit split on the issue," *id.* at 663, and then proceeded to adopt the majority position, *id.* at 663–66, resulting in a 5-2 circuit split.

Upon Ms. Thurber's petition for a writ of certiorari, this Court invited the Solicitor General to file a brief expressing the views of the United States. *Thurber v. Aetna Life Ins. Co.*, 134 S. Ct. 381 (2013). The United States acknowledged that "the courts of appeals are divided on this question," U.S. Br. at 6, and proceeded to endorse the minority position, U.S. Br. at 9–15. Nevertheless, the government recommended against granting certiorari because a "predicate and case-specific question of plan interpretation could prevent the Court from reaching the first question presented." U.S. Br. at 15.

In the decision below and *AirTran*, the Eleventh Circuit joined the First, Second, Third, Sixth, and

Seventh Circuits in answering the question presented in the affirmative. The *AirTran* majority adopted the positions of "those circuit courts," Pet. App. 54, over a vigorous dissent in favor of the minority rule, Pet. App. 71 (Martin, J., dissenting) ("The majority relies on what I believe is a misapplication of *Sereboff*, accepted by some of our sister circuits, to characterize the recovery of assets no longer in the defendant's possession as equitable relief."). *AirTran* bound the panel in this case and, following denial of rehearing *en banc*, it is now the established law of the Eleventh Circuit.

II. The Decision Below Conflicts with this Court's Cases and Is Wrong on the Merits.

In the words of the dissenting judge in *AirTran*: "Supreme Court precedent makes clear that a plaintiff proceeding in equity to recover funds from a defendant must, at a minimum, show that those funds are presently in the defendant's possession." Pet. App. 65 (Martin, J., dissenting).

Specifically, the decision below—like each case in the circuit split majority—has taken a position that directly conflicts with the core teaching of *Knudson*: that "where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust or an equitable lien upon other property of the [defendant].'" *Knudson*, 534 U.S. at 213–214 (quoting Restatement of Restitution and Unjust Enrichment § 215, cmt. a, at 867 (1936) (brackets in original) ("Restatement").

Moreover, as the United States has explained, the decision below cannot be reconciled with black-letter principles that this Court has held must undergird any

claim for equitable relief. *See, e.g.*, U.S. Br. at 12 (discussing, *inter alia*, Restatement § 161, cmt. e (an "equitable lien [could] be established and enforced only if there [was] some property which [was] subject to the lien" and where "the property subject to the equitable lien can no longer be traced, the equitable lien cannot be enforced.")).

To reiterate: in its *Thurber* invitation brief, the United States has explained in detail why the position of the First, Second, Third, Sixth, Seventh (and now Eleventh) Circuits is wrong and conflicts with this Court's ERISA section 502(a)(3) cases. *See* U.S. Br. at 9–14 (explaining why the panel majority's holding is wrong and conflicts with this Court's ERISA section 502(a)(3) cases); 14–15 (specifically explaining the misreading of *Sereboff*). This Court should grant the petition and expressly approve or reject the government's formal position. Absent such intervention, the lower courts will continue to be hopelessly divided on this important question of federal law.

III. Immediate Review Is Necessary Because the Question Presented is Exceptionally Important and Requires a Uniform National Answer.

As explained above, this Court has decided several cases about the meaning of "appropriate equitable relief" in section 502(a)(3) of ERISA. In the wake of those cases, litigation pursuant to that section has focused on the historical conditions that pre-merger equity courts would require for particular forms of relief. Thus, in the context of fiduciaries suing participants, litigation in a wide range of cases now turns almost entirely on the question presented.

The financial security of millions of Americans hangs on the answer. As of 2006, ERISA plans covered over 132 million people. *See* William Pierron & Paul Fronstin, *ERISA Pre-emption: Implications for Health Reform and Coverage*, EMP. BENEFIT RESEARCH INST., at 11 (Feb. 2008), *available at* http://www.ebri.org/pdf/briefs pdf/ebri_ib_02a-20082.pdf. And it is beyond dispute that billions of dollars are at stake in reimbursement and overpayment disputes. In the disability context alone, 653,000 beneficiaries received more than $9.8 billion in disability replacement income last year. *See* COUNCIL FOR DISABILITY AWARENESS, 2014 LONG TERM DISABILITY CLAIMS REVIEW (2014), *available at* http:// www.disabilitycanhappen.org/research/CDA_LTD_Clai ms_Survey_2014.pdf.

Not surprisingly given the stakes, eight of the thirteen circuits have squarely addressed the question presented, and advocates on both sides have urged this Court to intervene. On one hand, insurance industry trade groups have argued that the refusal to permit equitable liens threatens the continued viability of a functioning and affordable private-sector insurance market. *See, e.g.*, Brief for the American Council of Life Insurers, America's Health Insurance Plans, and the American Benefits Council as Amicus Curiae in Support of Petition for Writ of Certiorari, First Unum Life Ins. Co. v. Bilyeu, 133 S.Ct. 1242 (Nov. 28, 2012) (No. 12-526) (arguing that "the question presented is one of pressing nationwide importance" and that the position of the United States "threatens immediate, significant consequences for employee benefit plans nationwide, particularly those providing employees with disability income insurance.").

On the other hand, advocates for those covered by ERISA welfare plans have argued that the ability of plan fiduciaries to enforce an equitable lien on an individual's general assets is patently unfair and was never intended by Congress. *See, e.g.*, Petition for a Writ of Certiorari at 20, Thurber v. Aetna Life Ins. Co., 134 S.Ct. 2723 (July 26, 2013) (No. 13-130) (explaining that "disability benefits are 'designed, by definition, to replace [an employee's] wages during a period when [she is] unable to work'" and noting that "[t]hat fact creates 'an extremely strong presumption' that these benefits are immediately spent on life necessities—'groceries, rent and the electric bill.'") (quoting *D & H Therapy Assoc.'s, LLC v. Boston Mut. Life Ins. Co.*, 691 F. Supp. 2d 304 (D.R.I. 2010)). *See also* Roy F Harmon III, *The Conflict Between ERISA Overpayment Claims and Statutory Protection of SSDI Benefits*, HEALTH PLAN LAW (Dec. 22, 2008), http://www.healthplanlaw.com/?p=1017 (arguing that the imposition of an equitable lien when disability insurance payments have already been spent on ordinary living expenses is nothing more than an unlawful attempt to use ERISA as an end-run around section 407(a) of the Social Security Act, which shields SSDI benefits from attachment).

Regardless of one's position on the merits, it should be clear that the current circuit split is intolerable. In passing ERISA, Congress sought to implement a uniform legal regime with predictable entitlements and liabilities. *See Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred."). "[A] uniform

administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits," is desirable for both fiduciaries and beneficiaries because it reduces administrative costs and increases the certainty of benefits. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)); *see generally* Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 WASH. U. L. REV. 433 (2010).

Uniformity and predictability in the enforcement of reimbursement and overpayment provisions is now impossible. *Cf. Egelhoff*, 532 U.S. at 148 ("Uniformity is impossible if plans are subject to different legal obligations in different States.").

For the many regional and nationwide ERISA plans, the upshot is more expensive and less reliable plan administration. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). An administrator must familiarize herself with the jurisprudence and geographic reach of the various circuits whenever she wants to find out whether she has a valid lien. *See Egelhoff*, 532 U.S. at 148–49.

Meanwhile, ERISA participants and beneficiaries everywhere face heightened uncertainty about long-received benefits. *See, e.g.*, Petition for a Writ of Certiorari, Thurber v. Aetna Life Ins. Co. at 20, 134 S.Ct. 2723 (July 26, 2013) (No. 13-130) ("[W]ith no clear uniform rule governing the standards for equitable overpayment claims, employees who receive disability benefits will be uncertain of whether they may later be subject to reimbursement claims seeking money long since spent on daily life needs."). And such individuals within the Eighth and Ninth Circuits will inevitably face

unlawful collection efforts. *See* Maher & Stris, *supra*, at 440 ("carelessness by the promisor or its agents can result in a wrongful refusal to confer a benefit"); *id.* at 442 (complexity of promise increases uncertainty).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 16, 2014

APPENDIX

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-11678

BOARD OF TRUSTEES OF THE
NATIONAL ELEVATOR INDUSTRY
HEALTH BENEFIT PLAN,

Plaintiff-Appellee,

v.

ROBERT MONTANILE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida
D.C. Civil Action No. 12-80746-Civ-Brannon
(Honorable Steven M. Larimore)

Argued: November 21, 2014

Before: HULL, MARCUS, and DUBINA, *Circuit Judges*.

Filed: November 25, 2014

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OPINION OF THE COURT

HULL, *Circuit Judge*.

Defendant-appellant Robert Montanile appeals the district court's grant of summary judgment in the amount of $121,044.02 in favor of the plaintiff-appellee Board of Trustees of the National Elevator Industry Health Benefit Plan (the "Board") in its lawsuit against Montanile. After an automobile accident, Montanile received a settlement from a third-party tortfeasor for injuries he suffered in the accident. After that settlement, the plaintiff Board sued Montanile for reimbursement of the medical expenses already paid on defendant Montanile's behalf. After review, we affirm.

I. BACKGROUND

The facts of this case are largely undisputed. The Board is the named fiduciary and administrator of the National Elevator Industry Health Benefit Plan (the "Plan"). The Plan is an employee welfare benefit plan as defined by the Employee Retirement Income Security

Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. At all relevant times, Robert Montanile was a covered employee under the Plan.

A. The Plan Documents

The parties filed three relevant documents relating to the Plan. The first document, the Restated Agreement and Declaration of Trust (the "Trust Agreement"), establishes the Plan for the benefit of members of the International Union of Elevator Constructors (the "Union").[1] The Trust Agreement also provides for the management of the Plan, governs Plan contributions, and creates general rules for claim management.

The Trust Agreement, however, does not provide the details regarding the health coverage and the benefits provided by the Plan and does not specify the procedures by which participants may seek benefits. Rather, the Trust Agreement gives the Board "full discretionary authority to adopt a Plan of Welfare Benefits, which sets forth eligibility requirements, type, amount, and duration of benefits that are to be provided to eligible employees . . " The Trust Agreement also provides that the "detailed basis on which payment of benefits is to be made pursuant to this Trust Agreement shall be set forth in the Plan of Welfare Benefits." "Such Plan of Welfare Benefits shall be subject to amendment by the Trustees from time to time as they may, in their discretion, determine " The Trust Agreement thus expressly

---

[1] The record neither specifies Montanile's employer, nor expressly states that Montanile was a member of the Union. Nonetheless, the parties agree that Montanile was covered by the Plan at all relevant times.

contemplates that the participants' health coverage and benefits shall be set forth in a separate plan document from the Trust Agreement.

The second document, the National Elevator Bargaining Association Agreement with International Union of Elevator Constructors (the "Bargaining Agreement"), was effective from July 9, 2007, through July 8, 2012. The Bargaining Agreement specified that there would be a "Health Benefit Plan" and that any changes to the Plan would be part of the bargaining agreement, as follows:

> The Health Benefit Plan covering life insurance, sickness and accident benefits, and hospitalization insurance, or any changes thereto that are in accordance with the National Elevator Industry Health Benefit Plan and Declaration of Trust, shall be a part of this Agreement and adopted by all parties signatory thereto.

The Bargaining Agreement also provided that "the decision(s) to increase or decrease the benefits provided by the Health Benefit Plan are matters committed to the discretion of the Trustees ." The Bargaining Agreement did not specify any rights or obligations regarding the benefits that would be set forth in the Plan.

The third document, the 2005 version of the National Elevator Industry Health Benefit Plan Summary Plan Description (the "NEI Summary Plan Description"), was effective through, at least, May 2011. The 2005 version of the NEI Summary Plan Description was "written to reflect the changes in the Health Benefit Plan since the last version was printed." The document "provide[d] the required information about [Plan beneficiaries'] rights

and protection under the law in order to comply with the Employee Retirement Income Security Act of 1974."

The NEI Summary Plan Description was 87 pages long and contained, inter alia, detailed information regarding eligibility for health benefits, the extent of specific types of benefits, and claim-filing procedures. The NEI Summary Plan Description also included provisions regarding the benefits provided by the Plan when the losses were caused by a third party and the Plan's rights to recovery and reimbursement. The NEI Summary Plan Description set forth the Plan's rights to subrogation and first-recovery reimbursement out of any amounts recovered by the Plan participants from another party as follows:

> **The Plan's Right of Recovery**
>
> The Plan has the right to recover benefits advanced by the Plan to a covered person for expenses or losses caused by another party. . . .
>
> Amounts that have been recovered by a covered person from another party are assets of the Plan by virtue of the Plan's subrogation interest and are not distributable to any person or entity without the Plan's written release of its subrogation interest. . .
>
> The Plan's right of recovery also applies if benefits are advanced by the Plan to an individual on behalf of an injured covered person or to the covered person's assignee.
>
> **The Plan's Right of Reimbursement**
>
> The Plan has a right to first reimbursement out of any recovery. Acceptance of benefits from the

> Plan for an injury or illness by a covered person, without any further action by the Plan and/or the covered person, constitutes an agreement that any amounts recovered from another party by award, judgment, settlement or otherwise, and regardless of how the proceeds are characterized, will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan due to the injury or illness and without reduction for attorneys' fees, costs, expenses or damages claimed by the covered person, and regardless of whether the covered person is made whole or recovers only part of his/her damages.

(Emphasis added). While the NEI Summary Plan Description had this reimbursement provision, the Trust Agreement and the Bargaining Agreement did not have a similar provision.

B. Montanile's Injury and the Reimbursement Dispute

On December 1, 2008, Montanile was injured in a car accident involving a drunk driver. Montanile suffered injuries to his neck and lower back, requiring lumbar spinal fusion surgery and other medical treatment to reduce his pain and loss of function. The Plan paid Montanile's initial medical expenses of $121,044.02.

Montanile retained counsel and initiated a civil lawsuit against the driver of the other car for negligence. Montanile eventually obtained a $500,000 settlement from the other driver. Out of the settlement funds, Montanile paid his attorneys a $200,000 contingency fee and $63,788.48 to reimburse out-of-pocket expenses.

After defendant Montanile accepted the settlement, the plaintiff Board, as fiduciary for the Plan, asserted that the Plan had the right to be reimbursed out of the settlement proceeds for the medical expenses paid on Montanile's behalf. The Board and Montanile, through counsel, attempted to negotiate a resolution from June 2011 through January 2012. After settlement discussions reached an impasse, the Board filed a single-count ERISA lawsuit to enforce the Plan's reimbursement provision.

C. District Court Proceedings

In its complaint, the plaintiff Board alleged that "the National Elevator Industry Health Benefit Plan Summary Plan Description" met ERISA's requirement of a written plan and summary plan description. The Board claimed that, pursuant to the NEI Summary Plan Description, Montanile was required to fully reimburse the Plan from the settlement payment he received.

The plaintiff Board further alleged that "all or part of the settlement proceeds are within the actual or constructive possession of" Montanile and claimed that the Plan was "entitled to equitable restitution in the form of a constructive trust or equitable lien with respect to the disputed funds held in Defendant [Montanile's] actual or constructive possession." The Board therefore requested that defendant Montanile "be ordered to turn over to the Plan any settlement funds in his actual or constructive possession (up to the amount of the benefits advanced by the Plan on his behalf) in order to enforce the written terms of the Plan of Welfare Benefits and ERISA."

In his answer, defendant Montanile admitted that the Plan "described in paragraph 11 of the Complaint" is one

of the governing documents for the ERISA group health benefits Plan at issue in this case." However, Montanile later reversed course and moved for summary judgment, arguing, inter alia, that the Bargaining Agreement and the Trust Agreement were the only "governing plan documents." Montanile contended that any subrogation or reimbursement rights the Plan asserted must accordingly be found in one of those two documents.

The Board opposed Montanile's summary-judgment motion. The Board contended that the NEI Summary Plan Description was a governing Plan document that could establish subrogation and reimbursement rights because the Bargaining Agreement and the Trust Agreement "reference a separate plan document that sets forth eligibility requirements, type, amount, and duration of benefits that are to be provided to covered persons." According to the Board, the NEI Summary Plan Description was that document; no other document met the qualifications of a written plan of welfare benefits, and no other document defined a covered person's right to benefits under the Plan. The Board also filed its own cross-motion for summary judgment.

Montanile opposed the Board's cross-motion for summary judgment, arguing that the reimbursement sought by the Board was not "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3)(B) because the funds on which the Board wished to assert an equitable lien had been dissipated through payments Montanile had made since receiving the settlement.

The district court found that the NEI Summary Plan Description was an enforceable, governing plan document required by ERISA. Specifically, the district court stated that "[t]here can be no doubt that the NEI

Summary Plan Description functioned as both the governing Plan document and the summary plan description mandated by ERISA." The district court also then found that reimbursement was appropriate equitable relief under § 1132(a)(3)(B) because "[t]he settlement proceeds represent an identifiable fund to which the Plan's lien attached and such proceeds belong 'in good conscience' to the Plan to the extent of the medical expenses it paid on Defendant's behalf." Accordingly, the district court denied Montanile's motion for summary judgment and granted summary judgment in favor of the Board in the amount of $121,044.02, which was what the Board had paid as Montanile's medical expenses.

Montanile timely appealed.

II. RELEVANT ERISA PROVISIONS

ERISA authorizes plan participants and beneficiaries to bring civil actions "to recover benefits due" and "to enforce . rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). The statute also authorizes participants, beneficiaries, and fiduciaries of a plan to seek "appropriate equitable relief to enforce the terms of the plan." Id. § 1132(a)(3)(B).

The statute does not specify where the "terms of the plan" must be found, but it does require every "employee benefit plan" to be "established and maintained pursuant to a written instrument." Id. § 1102(a)(1). The written instrument "shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." Id.

In the same section as the "written instrument" provision, ERISA requires that each plan must

> (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan . . . ,
>
> (2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan . . ,
>
> (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and
>
> (4) specify the basis on which payments are made to and from the plan.

Id. § 1102(b). The text of the statute, however, does not state that the four requirements of each plan must be in the same "written instrument" that establishes and maintains the Plan.

Nonetheless, ERISA mandates that a "summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries" of the plan. Id. § 1022(a). "The summary plan description . . shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." Id.

III. DISCUSSION

On appeal, Montanile argues that the district court erred in finding that the Board could impose an equitable lien on the settlement funds because the funds had been spent or dissipated. As both parties recognize in their

supplemental briefs, Montanile's argument is now foreclosed by our recent holding in AirTran Airways, Inc. v. Elem, 767 F.3d 1192 (11th Cir. 2014). This Court held in AirTran that, pursuant to § 1132(a)(3)(B), an equitable lien immediately attached to settlement funds where a plan provision's unambiguous terms gave the plan a first-priority claim to all payments made by a third party. Id. at 1198. The AirTran court held that the settlement funds were "specifically identifiable," and a plan participant's dissipation of the funds thus "could not destroy the lien that attached before" the dissipation. Id. (emphasis in original). This holding binds our decision here. Accordingly, the Board can impose an equitable lien on Montanile's settlement, even if dissipated, if his health benefit Plan gave the Plan a first-priority claim to the settlement payments Montanile received.

Here, the NEI Summary Plan Description gave the Plan a first-priority claim to settlement proceeds Montanile received from a third party. Therefore, as an alternative argument, Montanile contends that the NEI Summary Plan Description is not a governing Plan document and thus its terms are not enforceable as part of the Plan. Because the district court concluded that the NEI Summary Plan Description was an enforceable, governing Plan document at the summary- judgment stage, we must review de novo, rather than for clear error. See Wooden v. Bd. of Regents of Univ. Sys. of Georgia, 247 F.3d 1262, 1271 n.9 (11th Cir. 2001) ("[A] district court does not make factual findings in deciding a summary judgment motion, so no question of clear error review . . . arises here.").

A. Dual Function of a Summary Plan Description

First, Montanile argues that a single document, such as the NEI Summary Plan Description, cannot be both (1) a written instrument that sets forth the Plan's terms, as required by § 1102(a)(1), and (2) a summary plan description, as required by § 1022.[2]

We have previously indicated that a single document can serve both functions. See Alday v. Container Corp. of Am., 906 F.2d 660, 666 (11th Cir. 1990) (stating that a summary plan description "clearly functioned as the plan document required by ERISA" and "unambiguously set out the rights of the parties"). Indeed, in his response to the Board's cross-motion for summary judgment in the district court, "Montanile acknowledge[d] that ERISA plan fiduciaries may draft a document that operates both as the governing plan document and the SPD mandated by ERISA "[3] However, Montanile on appeal now contends that the Supreme Court's decision in CIGNA Corp. v. Amara, 563 U.S. ___, 131 S. Ct. 1866, 1870 (2011), requires us to hold otherwise.

In Amara, the original provisions contained in CIGNA's governing pension plan document provided that employees would receive a pension plan in the form of a defined-benefit annuity. Id. at ___, 131 S. Ct. at 1871. In

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[2] Although the plaintiff Board claims that defendant Montanile waived this argument, we need not resolve that issue as it lacks merit in any event.

[3] In the district court, Montanile conceded that a summary plan description could serve as a governing document, but contended that the NEI Summary Plan Description did not so serve. We address this argument infra, Part III.B.

November 1997, CIGNA announced in a newsletter that it was converting the pension plan into a plan with "cash balance" individual retirement accounts. Id. at ___, 131 S. Ct. at 1871-72. In 1998, CIGNA effected the change to cash-balance accounts in new governing plan documents. Id. However, the district court found that CIGNA intentionally misled its employees in the November 1997 written communication regarding the changes. Id. at ___, 131 S. Ct. at 1872. The district court then reformed the plan's provisions to be consistent with the November 1997 written communication regarding the change. Id. at ___, 131 S. Ct. at 1875-76. Importantly, the district court's reformation did not merely reinstate the defined-benefit plan. Instead, the district court created a plan that included terms that were not found in either the original plan or the new plan. See id. at ___, 131 S. Ct. at 1876-77.

After granting certiorari, the Supreme Court held that the district court lacked the power, pursuant to § 1132(a)(1), to change the terms of the plan where the change imposed by the court "seems less like the simple enforcement of a contract as written and more like an equitable remedy." Id. at ___, 131 S. Ct. at 1876-77. The Supreme Court rejected the proposition that the 1997 written communication, even if construed as a statutorily-required plan summary, "necessarily may be enforced as the terms of the plan itself."[4] Id. at ___, 131 S. Ct. at

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[4] Although the misleading communication at issue in Amara was a summary of a material plan change, both summaries of material changes made to ERISA plans and the standard summary plan descriptions are governed by 29 U.S.C. § 1022(a). Accordingly, the Supreme Court indicated that its analysis applied with equal force to summary plan descriptions. See Amara, 563 U.S. at ___, 131 S. Ct. at 1877 ("[W]e cannot agree that the terms of statutorily required plan

(continued ...)

1877 (emphasis added). The Supreme Court stated that the syntax of § 1022(a), "requiring that participants and beneficiaries be advised of their rights and obligations 'under the plan,' suggests that the information about the plan provided [in a summary plan description] is not itself part of the plan." Id. (emphasis in original).

Additionally, the Supreme Court stated that it had "no reason to believe that the statute intends to mix the responsibilities [of plan sponsor and plan administrator] by giving the administrator the power to set plan terms indirectly by including them in the summary plan descriptions." Id. Finally, the Supreme Court noted that "[t]o make the language of a plan summary legally binding could well lead plan administrators to sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers." Id. at ___, 131 S. Ct. at 1877-78.

Although "dicta from the Supreme Court is not something to be lightly cast aside," Peterson v. BMI Refractories, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997), the facts of this case are materially distinguishable from the facts of Amara. To begin with, the Supreme Court's holding in Amara—that the district court lacked the power under § 1132(a)(1) to enforce an equitable remedy—does not impact our analysis. The provision under which the Board seeks relief here, § 1132(a)(3), specifically grants the Board the right to seek equitable relief. 29 U.S.C. § 1132(a)(3)(B).

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summaries (or summaries of plan modifications) necessarily may be enforced (under § 502(a)(1)(B)) as the terms of the plan itself.").

Furthermore, Amara only precludes courts from enforcing summary plan descriptions, pursuant to § 1132(a)(1), where the terms of that summary conflict with the terms specified in other, governing plan documents. However, the Amara Court had no occasion to consider whether the terms of a summary plan description are enforceable where it is the only document that "specif[ies] the basis on which payments are made to and from the plan," as required by § 1102(b). Cf. Eugene S. v. Horizon Blue Cross Blue Shield of New Jersey, 663 F.3d 1124, 1131 (10th Cir. 2011) (holding that Amara did not prevent a court from giving deferential review to a Plan's decision regarding a term found only in a summary plan description because "the SPD does not conflict with the Plan or present terms unsupported by the Plan; rather, it is the Plan" (emphasis in original)). Indeed, the Amara Court's rejection of the proposition that summary plan descriptions "necessarily may be enforced as the terms of the plan itself" leaves open the possibility that terms in those summaries may, at times, be enforced, even though they are not always enforceable. See Amara, 563 U.S. at ___, 131 S. Ct. at 1877 (emphasis added).

Here, the NEI Summary Plan Document does not conflict with any pre-existing plan documents that set out the rights of the parties—because no other written instrument specifies the benefits and obligations of Plan participants. The terms specified in that summary plan description are enforceable, pursuant to § 1132(a)(3) because (1) no other document lays out the rights and obligations of plan participants and (2) the Trust Agreement contemplated the rights and obligations would be set forth in a separate document.

B. The Governing Documents

In the alternative, Montanile argues that, even if a summary plan description theoretically could serve both roles, the district court erred by finding that terms found only in the NEI Summary Plan Description were enforceable because the Trust Agreement constituted the sole governing Plan document.[5]

Enforceable plan terms may be found in more than one document. See Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83, 115 S. Ct. 1223, 1230 (1995) ("In the words of the key congressional report, '[a] written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.'" (quoting H.R. Conf. Rep. No. 93-1280, at 297, as reprinted in 1974 U.S.C.C.A.N. 5038, 5077-78) (emphasis added)). Montanile does not dispute this point.

Here, the terms of the Trust Agreement demonstrate that the enforceable terms of the Plan are to be found in more than just that one document. In particular, the Trust Agreement does not "specify the basis on which payments are made to and from the plan," as required by § 1102(b). Rather, it states that the Trustees will establish the "detailed basis on which payment of benefits is to be made" in "the Plan of Welfare Benefits." Although the NEI Summary Plan Description does not carry the title contemplated by the Trust Agreement, it serves the precise function as that proposed for the "Plan of Welfare Benefits." Indeed, Montanile initially

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[5] Montanile no longer contends that the Bargaining Agreement is a governing Plan document.

admitted that the NEI Summary Plan Description was "one of the governing documents for the ERISA group health benefits Plan at issue in this case" before reversing course in his motion for summary judgment.

Furthermore, if the enforceable terms of the Plan were limited to those found in the Trust Agreement, there would be no governing document that specifies Plan participants' rights or obligations regarding benefits. Plan participants would thus be barred from enforcing their rights under the straight-forward provisions of § 1132(a)(1). And, if we held that the Board could not use the equitable provision of § 1132(a)(3) to enforce the Plan's right to reimbursement, it would not be clear that Plan participants could enforce in equity any participant rights found solely in the NEI Summary Plan Description. We refuse to embrace such an outcome. See Admin. Comm. of Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Gamboa, 479 F.3d 538, 544 (8th Cir. 2007) ("ERISA requires a written arrangement, and no other document exists by which group health benefits are provided... It would be nonsensical to conclude that the plain language of the Plan requires an interpretation that renders no plan at all under the terms of ERISA.").

We hold that the NEI Summary Plan Description constitutes a written instrument that sets out enforceable "terms of the plan." See Alday, 906 F.2d at 666. Accordingly, pursuant to § 1132(a)(3), the Board could enforce the term found in the NEI Summary Plan Description that gave it a subrogation interest in sums recovered from third parties.

IV. CONCLUSION

For all of the foregoing reasons, we affirm the district court's grant of summary judgment in favor of the Board and denial of Montanile's summary-judgment motion.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 12-80746-Civ-Brannon

BOARD OF TRUSTEES OF THE NATIONAL ELEVATOR INDUSTRY HEALTH BENEFIT PLAN,

Plaintiff,

v.

ROBERT MONTANILE,

Defendant.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Larimore, J. **March 17, 2014**

THIS CAUSE is before the Court on Plaintiff s suit for the reimbursement of funds it expended to cover Defendant's accident-related medical expenses from the proceeds of Defendant's later settlement with a third-party tortfeasor. The parties agree that this case is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., and the parties have cross-moved for summary judgment (DE 35 & DE 36). Both motions are fully briefed and ripe for review. For the following reasons, the Court finds that

Plaintiff is entitled to summary judgment and Defendant is not.

I. STANDARD OF REVIEW

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). "An issue of fact is 'material ' if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). In making this determination, a court must review all evidence and draw all reasonable inferences in favor of the non-moving party. Chapman v. Al Trans., 229 F.3d 1012, 1023 (11th Cir. 2000). The court will not weigh the evidence or find facts; rather, it determines only if there is sufficient evidence upon which a reasonable juror could find for the non-moving party. Morrison v. Amway Corp., 323 F.3d 920, 924 (11th Cir. 2003).

Cross-motions for summary judgment do not change the standard and a court must consider each such motion separately. American Bankers Ins. Group v. U.S., 408 F.3d 1328, 1331 (11th Cir. 2005); Ernie Haire Ford, Inc. v. Universal Underwriters Ins. Co., 541 F. Supp. 2d 1295, 1297-98 (M.D. Fla. 2008). Each moving party carries the initial burden of proof and meets this burden by identifying portions of the record that demonstrate the absence of any genuine issue of material fact. Celotex, 477 U.S. at 322-24. Once the initial burden is satisfied, the burden shifts to the opposing party to demonstrate through the production of probative evidence that there remains a genuine issue of fact to be tried. Id.

II. STATEMENT OF FACTS

The facts of this case are largely undisputed. Plaintiff Board of Trustees is the named fiduciary and administrator of the National Elevator Industry Health Benefit Plan ("Plan") (DE 36 at 1). The Plan is an "employee welfare benefit plan" as that term is defined in ERISA (Id.). At all relevant times, Defendant was a covered employee under the Plan (Id. at 2).

The parties have filed three documents relating to the Plan. The first document—a "Restated Agreement and Declaration of Trust" dated May 20, 1976 ("Declaration of Trust")—contains a section titled "Plan of Welfare Benefits" stating:

> Benefits. The Trustees shall have full discretionary authority to adopt a Plan of Welfare Benefits, which sets forth eligibility requirements, type, amount, and duration of benefits that are to be provided to eligible employees, based on what is actuarially determined to be within the financial limitations of the National Elevator Industry Welfare Plan, provided, however that no benefits, other than welfare benefits, may be provided for or paid under this Agreement and Declaration of Trust
>
> . . .
>
> Written Plan of Benefits. The detailed basis on which payment of benefits is to be made shall be set forth in the Plan of Welfare Benefits. Such Plan of Welfare Benefits shall be subject to amendment by the Trustees from time to time as they may, in their discretion, determine. .

(DE 36-2 at 33-34). The second document—the "National Elevator Industry Health Benefit Plan Summary Plan

Description" with an introductory letter dated January 2005 ("SPD")—contains a section titled "Other Party Liability Claims" stating:

> **The Plan's Right of Recovery**
>
> The Plan has the right to recover benefits advanced by the Plan to a covered person for expenses or losses caused by another party. If a covered person is injured or becomes ill under circumstances where another party is directly or indirectly liable for the illness or injury, the Plan is only obligated to provide covered benefits resulting from that illness or injury that exceed any amounts recovered from another party (whether or not the amount is recovered is designated to cover medical expenses).
>
> Amounts that have been recovered by a covered person from another party are assets of the Plan by virtue of the Plan's subrogation interest and are not distributable to any person or entity without the Plan's written release of its subrogation interest. However, amounts recovered by such covered person from another party in excess of benefits paid by the Plan are the separate property of such covered person. Unless otherwise noted in this SPD, amounts received from an individual health insurance policy for which the injured covered person or other family member has paid premiums are also the separate property of the covered person.

The Plan's Right of Reimbursement

The Plan has a right to first reimbursement out of any recovery. Acceptance of benefits from the Plan for an injury or illness by a covered person, without any further action by the Plan and/or the covered person, constitutes an agreement that any amounts recovered from another party by award, judgment, settlement or otherwise, and regardless of how the proceeds are characterized, will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan due to the injury or illness and without reduction for attorneys' fees, costs, expenses or damages claimed by the covered person , and regardless of whether the covered person is made whole or recovers only part of his/her damages.

Acceptance of benefits from the Plan for an illness or injury by a covered person constitutes the covered person's agreement to file a claim for benefits against any party who is liable for the injury or illness to the covered person and to file claims under any and all applicable policies of insurance or self-insurance, including but not limited to homeowners insurance, auto insurance, or any liability policy held for a public or commercial entity. The covered person must promptly file a claim for damages against any party liable and any such applicable policy and notify the Plan of his/her claim against such parties or policies or other recovery efforts. The covered person agrees that neither he/she nor anyone acting on his/her behalf will settle any claim relating to the injury or illness without the written consent of the Plan. The Plan reserves the

> right to make all decisions with respect to its rights of subrogation and recovery.

(DE 36-4 at 26). The third document—the "National Elevator Bargaining Association Agreement with International Union of Elevator Constructors July 9, 2007 to July 8, 2012" ("Bargaining Association Agreement")—contains a section titled "Health Benefit Plan" stating:

> The Health Benefit Plan covering life insurance, sickness and accident benefits, and hospitalization insurance, or any changes thereto that are in accordance with the National Elevator Industry Health Benefit Plan and Declaration of Trust, shall be a part of this Agreement and adopted by all parties signatory thereto.

(DE 35-3 at 42).

On December 1, 2008, Defendant was injured in a car accident involving a drunk driver, and the Plan paid $121,044.02 to cover the cost of his medical expenses (DE 1 at 2; DE 36 at 2-3; DE 39-3, Montanile Aff. ¶ 2). Defendant later retained counsel to pursue compensation for his accident-related injuries in the form of a civil negligence suit against the other car's driver and ultimately obtained a $500,000 settlement (DE 35 at 2; DE 39 at 3; DE 39-3, Montanile Aff. ¶ 5). In accordance with its fiduciary duty to enforce Plan terms, Plaintiff asserted a right to be reimbursed for the medical expenses paid on Defendant's behalf out of the settlement proceeds and the parties attempted, through counsel, to negotiate a resolution from June 2011 through January 2012 (DE 39-3, Montanile Aff. ¶ 8; DE 35-2, King Aff. ¶¶ 3-5). After a resolution could not be reached, on July 11, 2012, Plaintiff filed the instant

single-count ERISA suit to enforce the reimbursement provision in its Plan (DE 1).

III. ANALYSIS

ERISA authorizes a plan fiduciary to bring a civil action "to obtain appropriate equitable relief" to enforce the terms of a plan. 29 U.S.C. § 1 132(a)(3)(B). In a recent case, the Supreme Court reaffirmed its prior holding that a health plan fiduciary like Plaintiff may bring suit under § 1132(a)(3)(B) to enforce a provision for reimbursement. US Airways, Inc. v. McCutchen, 133 S. Ct. 1537, 1545 (2013). Such a claim, the Supreme Court explained , is the modem-day equivalent of an action in equity to enforce a contract-based lien–called an "equitable lien 'by agreement.'" Id. (quoting Sereboff v . Mid Atlantic Medical Servs., Inc., 547 U.S. 356, 364-65 (2006)).

Two disputed legal issues emerge from the parties' summary judgment briefing: (1) whether the Summary Plan Description's "Other Party Liability Claims" provision ("OPL") creates an enforceable right to reimbursement from Defendant's post-accident settlement proceeds, and (2) if so, whether such reimbursement is "appropriate equitable relief" under ERISA.

1. *Plaintiff's Right to Reimbursement*

Plaintiff satisfies the basic requirements for seeking relief under 29 U.S.C. § 1 132(a)(3)(B). Plaintiff is an ERISA "fiduciary" seeking—as in McCutchen and Sereboff—relief that is "equitable" in nature. In its fiduciary capacity, Plaintiff relies upon the OPL in the Summary Plan Description as creating a valid and enforceable right to reimbursement. Defendant contends that the Summary Plan Description is not a governing plan document, and thus its OPL provision cannot be

relied upon to establish a right not otherwise included in what Defendant views as the only two governing plan documents—namely, the Declaration of Trust and the Bargaining Association Agreement.

The Court readily finds for Plaintiff on this first issue. ERISA defines summary plan descriptions as one of many plan documents that plan administrators must provide to plan participants. 29 U.S.C. § 1024; Alday v. Container Corp. of Am., 906 F.2d 660, 665 (11th Cir. 1990). ERISA mandates that summary plan descriptions "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C.A. § 1022(a); see also McKnight v. Southern Life & Health Ins. Co., 758 F.2d 1566, 1570 (11th Cir. 1985)("ERISA provides that the summary shall be an accurate and comprehensive document that reasonably apprises the employees of their rights under the plan."). The Eleventh Circuit has held that the terms of a summary plan description that "clearly functioned as the plan document required by ERISA" and unambiguously conferred on the employer the right to modify a medical insurance plan were controlling to the exclusion of other plan-related communications. Alday, 906 F.2d at 666.

Defendant's argument that the Summary Plan Description is not an enforceable plan document is unavailing. Importantly, the Summary Plan Description supplements and is not in conflict with the other two Plan documents of record. Both the Declaration of Trust and the Bargaining Association Agreement expressly refer to a separate document that contains more detailed information about the nature and scope of benefits available to Plan participants. See DE 36-2 at 33 ("The

Trustees shall have full discretionary authority to adopt a Plan of Welfare Benefits, which sets forth eligibility requirements, type, amount, and duration of benefits . . ."); DE 35-3 at 42 ("The Health Benefit Plan covering life insurance, sickness and accident benefits, and hospitalization insurance, or any changes thereto that are in accordance with the National Elevator Industry Health Benefit Plan and Declaration of Trust, shall be a part of this Agreement and adopted by all parties signatory thereto."). Despite the references to different document titles—*i.e.*, "Plan of Welfare Benefits" and "Health Benefit Plan"—the Summary Plan Description is the only document out of the trio of documents that fits the bill of the separate benefit Plan document contemplated by the other two. The Summary Plan Description is also the only document that clearly sets out the parties' rights and responsibilities concerning health benefit eligibility and coverage, including but not limited to Defendant's right to receive medical benefits in the first place.

Undisputed affidavit testimony supports the conclusion that the Summary Plan Description is a governing plan document. Plaintiff submits two affidavits by its Director of Health Claims Administration, John McGowan, averring that the Plan was created by the Declaration of Trust and that, pursuant to the terms in the Declaration of Trust, Plaintiff approved the Summary Plan Description for administration as the only formal Plan document setting forth the rights and benefits of Plan participants. (DE 36-1, McGowan Aff. ¶¶ 4, 6-9; DE 41-1, McGowan Supp. Aff. ¶ 4). Defendant offers no factual evidence to dispute or otherwise challenge these averments.

Viewing the undisputed evidence as a whole, including the documents and Mr. McGowan's

unchallenged affidavit statements, the Summary Plan Description is clearly contemplated by the other two documents and is the only document containing the requisite information about eligibility requirements, type, amount, and duration of benefits for Plan participants. There can be no doubt that the Summary Plan Description functioned as both the governing Plan document and the summary plan description mandated by ERISA. In plain language, the Summary Plan Description's OPL clearly notifies Defendant and other Plan participants of Plaintiff s right to be reimbursed from any settlement proceeds recovered from a liable third party. Neither the Declaration of Trust nor the Bargaining Association Agreement contain any language to contradict this express right to reimbursement and a reasonable person in Defendant's position would have expected to reimburse Plaintiff. As the saying goes, what is good for the goose is good for the gander. Just as Defendant and other Plan participants were entitled to justifiably rely on the Summary Plan Description's provisions for medical benefit coverage, Plaintiff is entitled to rely on the Summary Plan Description's provision for reimbursement as a condition tied to such coverage.

Defendant cites Cigna Corp. v. Amara, 131 S.Ct. 1866 (2011) for the proposition that a summary plan description can never serve as an ERISA plan document. Cigna does not sweep so broadly. There, several Cigna employees on behalf of 25,000 beneficiaries challenged Cigna's adoption of a new contribution plan on grounds that the summary plan description and prior Cigna announcements describing the plan were inaccurate and misleading. Id. at 1870-71. After finding that Cigna's inaccurate disclosures violated ERISA, a federal district

court reformed the plan's terms and ordered benefit payments under the judicially reformed plan. Id.

The Supreme Court reversed, finding that reformation was not an available remedy under ERISA's recovery-of-benefits-due provision, 29 U.S.C. § 1132(a)(1)(B), which authorizes a plan beneficiary to bring a civil action to recover benefits due under plan terms. Id. In so ruling, the Supreme Court rejected an argument that the terms of summary plan descriptions "may be enforced as the terms of the plan itself[,]" holding instead that "summary documents, important as they are, provide communication with beneficiaries about the plan, but that their statements do not themselves constitute the terms of the plan for purposes of § [1132](a)(1)(B)." Id. at 1877-78 (emphasis in original). At the core of this holding is the requirement that there be a conflict between the language of a summary plan description and a controlling plan document before the summary plan's terms can be ignored or overridden. Here, no such conflict exists. Unlike the summary communications at issue in Cigna, the SPD in this case did not inaccurately describe plan information or add new inconsistent terms. The Declaration of Trust authorized Plaintiff to establish a health benefit plan, which Plaintiff did when it approved the Summary Plan Description. Since the Summary Plan Description and other Plan documents are not in conflict, the important policy of protecting Plan members from inaccurate information—a policy concern of great import in Cigna—is not implicated here. As the only Plan document that describes in detail the nature and extent of health benefits coverage, the Summary Plan Description is a governing ERISA plan document and the unambiguous OPL, in effect at the time of Defendant's accident, provides Plaintiff with the right to seek reimbursement from Defendant's post-accident settlement proceeds. To

conclude otherwise would be contrary to the purpose and spirit of ERISA.

Defendant makes two additional arguments, both of which merit only brief discussion. First, Defendant contends the OPL is unenforceable because the Declaration of Trust requires that any plan amendments, such as the Summary Plan Description provision for reimbursement, be actuarially based. A plain reading of the Declaration of Trust reveals, however, that consultation with an actuary to determine if a proposed amendment is "actuarially within the financial limitations" of the Plan is required only in the case of an "amendment that increases the amount of the benefits or adds additional benefits." (DE 36-2 at 34). No party asserts that the OPL increased or added benefits; indeed, the OPL did just the opposite by requiring that the Plan be reimbursed out of any third-party recovery. Thus, this argument fails.

Second, Defendant contends that the OPL is unenforceable based on Plaintiff's failure to ensure compliance with ERISA 's anti-inurement provisions or otherwise provide Defendant with information about how Plaintiff will distribute any funds recovered from Defendant. Defendant's argument in this regard is misplaced. The Court is unaware of any authority, and Defendant has cited none, that conditions Plaintiff's ERISA claim for reimbursement on Plaintiff's demonstrated compliance with ERISA's anti-inurement provisions. Thus, the Court rejects this argument.

2. *Whether Reimbursement is "Appropriate" under ERISA*

Having concluded that Plaintiff is entitled to seek reimbursement, the Court turns next to Defendant's argument that reimbursement is not "appropriate

equitable relief" under ERISA because: (1) Defendant's recovery did not make him whole and Plaintiff has expressed no willingness to share in the attorney fees incurred by Defendant to obtain the settlement, (2) Plaintiff failed to act responsibly and promptly in protecting its reimbursement interest during the pre-suit negotiation process, and (3) there is no separate and distinct fund to which the settlement proceeds can be traced as required by Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006).

Defendant's first argument is foreclosed by the Supreme Court 's recent decision in McCutchen. There, an employer sponsor of a health benefit plan filed suit under 29 U.S.C. § 1132(a)(3)(B) against a plan beneficiary who was injured in a car accident, received medical benefits from the plan, and later recovered money from third parties. McCutchen, 133 S. Ct. 1537 at 1543. The employer relied on a reimbursement clause as obligating the beneficiary to reimburse the plan "any monies recovered from [a] third party." Id. The beneficiary asserted equitable defenses, arguing that, under 29 U.S.C. § 1132(a)(3), such defenses trumped the reimbursement clause. Id. at 1545. The Supreme Court rejected this argument, holding that neither of the asserted equitable defenses—the double-recovery and common-fund doctrines—could "override the clear terms of a plan." Id. at 1543. The Court reasoned that since the ERISA plan documents were, in effect, a contract documenting the "expressed commitments" of the parties, that "when parties demand what they bargained for in a valid agreement," one of the parties cannot then ignore the plain language of the agreement by applying equitable defenses. Id. at 1546.

The Supreme Court went on to find, however, that an ambiguity in the plan about the allocation of attorney's

fees left "space for the common-fund rule to operate." Id. at 1549. The reimbursement provision gave the employer the first claim on "any monies recovered from [the] third party," and the Supreme Court found "recovered" ambiguous in that it could refer to a "recovery to which [the employer] has first claim [to] every cent the third party paid or, instead, the money the beneficiary took away" after deducting the costs of recovery, including attorney fees. Id at 1549-50. Based on this ambiguity, the Supreme Court found that "the common-fund rule informs interpretation of [the] reimbursement provision," and construed "recovered" to mean the beneficiary's net recovery, after deducting attorney fees. Id. at 1551. In sum, the McCutchen Court held that equitable principles cannot trump the clear language of an ERISA plan; such principles may only be used to fill in the gaps in the event of ambiguous or absent plan terms.

Here, the terms of the Plan expressly foreclose application of the make-whole doctrine, a variant of the double-recovery doctrine at issue in McCutchen.[1] In relevant part, the SPD states:

> The Plan has a right to first reimbursement out of any recovery. Acceptance of benefits from the

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[1] Under the make-whole doctrine, if an insured receives recovery for the same loss from more than one source, i.e., an insurer and a tortfeasor, it is only after the insured has been fully compensated for al l of the loss that the insurer acquires a right to subrogation. 16 Couch on Ins. § 223:134. As noted in McCutchen, the make-whole doctrine is a variant of the double-recovery rule, which limits an insurer's reimbursement to the share of settlement proceeds paying for medical expenses, with the insured keeping the rest to cover, for example, damages for loss of future earnings or pain and suffering. McCutchen, 133 S.Ct. at 1545-46.

> Plan for an injury or illness by a covered person, without any further action by the Plan and/or the covered person, constitutes an agreement that any amounts recovered from another party by award, judgment, settlement or otherwise, and regardless of how the proceeds are characterized, *will promptly be applied first to reimburse the Plan in full for benefits advanced* by the Plan due to the injury or illness and *without reduction for attorneys' fees, costs, expenses or damages* claimed by the covered person, and *regardless of whether the covered person is made whole* or recovers only part of his/her damages.

(DE 36-4 at 26) (emphasis added). Unlike in McCutchen, this provision is unambiguous: a Plan beneficiary's receipt of a third-party recovery triggers the beneficiary's responsibility to first reimburse "in full for benefits advanced by the Plan without reduction for attorney fees and regardless of whether the covered person is made whole." In view of this plain language, the make-whole doctrine does not apply.

Importantly, the Court is not being called on to consider how the Plan's reimbursement provision would operate if the debt owed to the Plan exceeded the third-party settlement amount. As such, the concern in McCutchen about discouraging injured beneficiaries from pursuing compensation is not present here because Defendant's settlement left an amount that-even after deducting all applicable attorney fees-readily exceeds the amount sought by the Plan as reimbursement. Compare DE 39-2 at 4-5 (settlement disbursement sheet showing that Defendant spent $200,000 in attorney fees (representing a 40% contingency fee) to secure his $500,000, leaving a real recovery of $300,000—well over the $121,044.02 sought by the Plan) with McCutchen, 133

S. Ct. at 1551 (beneficiary spent $44,000 (representing a 40% contingency fee) to get $110,000, leaving a real recovery of $66,000-less than the $66,866 sought by the employer, leading the Supreme Court to conclude that absent application of the common-fund rule, "the beneficiary is made worse off by pursuing a third party . . [W]e doubt if even [the employer] would want [that result]").

As a second argument, Defendant contends that reimbursement is not appropriate because the Plan failed to verify compliance with ERISA's anti-inurement provisions as requested by defense counsel in pre-suit communications and because the Plan unduly delayed in filing suit or otherwise taking steps to protect its reimbursement interest. As Plaintiff notes, this argument sounds in laches. To prove the equitable defense of laches, a defendant must show: (1) a delay in asserting a right or a claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. Kason Indus., Inc. v. Component Hardware Group, Inc., 120 F.3d 1199, 1203 (11th Cir. 1997).

The Court is unaware of any authority, and Defendant has cited none, that provides a basis to conclude that any failure by Plaintiff to verify anti-inurement information during the pre- suit negotiation process or that Plaintiff s timeframe for filing suit was unreasonable, inexcusable or prejudicial. There is no dispute that the parties, through counsel, exchanged a series of pre- suit communications for approximately eight months after Defendant received the settlement proceeds in an attempt to resolve Plaintiff's claim for reimbursement. There is also no dispute that Plaintiff filed suit against Defendant six months after the parties exchanged final settlement offers. And since ERISA

does not specify a limitations period for a fiduciary's action to enforce a reimbursement provision, this Court is guided by Florida's five-year statute of limitations for breach of written contract actions. See Blue Cross & Blue Shield of Alabama v. Sanders, 138 F.3d 1347, 1356 (11th Cir. 1998)(the forum state's statute of limitations for a simple contract action applies in an ERISA fiduciary's suit for reimbursement because "[i]n an ERISA action with no congressionally mandated limitations period, the district court must define the essential nature of the ERISA action and apply the forum state's statute of limitations for the most closely analogous action"); Fla. Stat. § 95.11(2)(b). In view of the undisputed facts, the absence of authority to support Defendant's position, and Florida's five-year statute of limitations for closely analogous breach of contract actions, the Court rejects this second argument.

As a third and final argument, Defendant contends that the relief sought by Plaintiff is inappropriate because the settlement funds have been dissipated and, as such, the Plan cannot identify a fund separate and distinct from the Defendant's general assets as is required by Sereboff. In support, Defendant submits a settlement disbursement sheet showing payments made out of the $500,000 settlement proceeds, including for attorney fees, costs, medical expenses, and satisfaction of a wide variety of liens (DE 39-3, Montanile Aff. Ex. A).[2]

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[2] Because the Court ultimately finds that any dissipation of settlement funds by Defendant is immaterial, the Court does not reach the parties' varying interpretations of this settlement disbursement sheet. The Court notes, however, that the sheet raises more questions than answers. For instance, it contains no dates for the various line-item disbursements and includes what appears to be erroneous calculations (the "Less: Medical expenses line" lists a deduction for "$1,213.22" but the listed medical expenses of $465.22,

(continued ...)

Defendant has also submitted an affidavit stating that after making the foregoing payments, "approximately $90,000" remained, most of which Defendant has "spent since the time of the settlement in supporting [him]self and his daughter and in maintaining our home" (DE 39-3, Montanile Aff. ¶ 6).

In recent times, the Supreme Court has twice addressed the issue of what qualifies as "appropriate equitable relief" under ERISA, 29 U.S.C. § 1132(a)(3). In Great-West Life & Annuity Ins . Co . v. Knudson, 534 U.S. 204 (2002), the Supreme Court found that, because a fiduciary sought reimbursement of funds that were not in a beneficiary's possession but had instead been placed in a "Special Needs Trust" under California law, it was seeking "in essence, to impose personal liability on [the beneficiary] for a contractual obligation to pay money-relief that was not typically available in equity." Id. at 214. The Knudson Court's rationale rested on the form of restitution sought by the fiduciary-a money judgment from undifferentiated assets of the beneficiary; because such action is classified as "legal" rather than "equitable," the fiduciary's claim was not one for which ERISA provided a remedy . Id. at 218 .

The Supreme Court later clarified this holding in Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006), which involved a plan fiduciary's suit to

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$398.00, $416.89, and $300.00 add up to $1,580.11). Defendant has supplied no other documents, such as bank statements or receipts, to establish the settlement fund disbursement history. Also noteworthy is Plaintiff's unchallenged statement that the "Blue Cross Blue Shield/Health Care Lien" for "$108,607.07" actually represents an amount "withheld from settlement to satisfy Plaintiff's reimbursement claim . . ." (DE 41 at 7).

enforce plan terms for reimbursement out of a beneficiary's post-accident settlement proceeds. The Court explained that as long as a plan fiduciary seeks "its recovery through a constructive trust or equitable lien on a specifically identified fund, not from the [beneficiaries'] assets generally," the claim is equitable in nature. Id. at 363. Applying that principle, the Sereboff Court held that the "specifically identified fund" was the "recover[y] from a third party (whether by lawsuit, settlement or otherwise)" and that the "particular share of that fund to which [the fiduciary] was entitled was the portion of the total recovery which is due for benefits paid." Id. at 364.

The settlement funds in Sereboff had been paid directly to beneficiaries who agreed to hold the funds in a separate account to avoid commingling of assets until the litigation resolved. Id. at 360. Thus, the Supreme Court held , the fiduciaries sought recovery of particularly identifiable funds in the beneficiaries' possession, and the impediment to recovery in Knudson did not exist. Id. at 362-63. Moreover, the plan's reimbursement provisions created an "equitable lien by agreement" on any future recovery by the beneficiary for the same injury; i.e., the settlement funds. Id. at 363. In support of its analysis, the Sereboff Court relied on a century-old case for the proposition that the fiduciary did not have to trace the property back to its own possession in order to assert the lien based on the "familiar rul[e] of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing." Id. at 364-65, 367 (quoting Barnes v. Alexander, 232 U.S. 117, 121 (1914)).

Of particular significance in the present case is Sereboff's rejection of an argument that the fiduciary's claim was not equitable because equitable restitution

requires a strict tracing of the tainted assets. First, the Court distinguished equitable restitution from equitable liens by agreement and affirmed that Barnes places no similar tracing requirement on the latter type of claim. Id. at 365. The Sereboff Court also refused to hold that Knudson crafted a new tracing requirement because Knudson described only "in general terms" a fiduciary's right to recover equitable restitution, and "[t]here was no need in Knudson to catalog all the circumstances in which equitable liens were available in equity. " Id. at 365. Neither Knudson nor Sereboff, in other words, exhaust the universe of "appropriate equitable relief," so long as both the claim and the relief sought sound in equity.

Following Knudson and Sereboff circuit courts—including the Eleventh-have enforced ERISA plan reimbursement provisions against third parties holding tort settlement funds achieved by plan beneficiaries. Constructive trusts have been imposed to enforce a plan's equitable lien by agreement on settlement proceeds held by a beneficiary's tort lawyer, Longaberger v. Kolt, 586 F.3d 459 (6th Cir. 2009); by a trustee of a beneficiary's wife's special needs trust, Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Shank, 500 F.3d 834 (8th Cir. 2007); and by a mom serving as conservator for her teenage son. Admin. Comm. for Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Horton, 513 F.3d 1223 (11th Cir. 2008). In each of these cases, the courts held that, under Knudson and Sereboff, an equitable lien for reimbursement attached to settlement proceeds as soon as a settlement fund arose from the injuries requiring plan payments. See, e.g. Longaberger, 586 F.3d at 467.

As stated by the Eleventh Circuit:

> Where property is held by one person upon a constructive trust for another, and the former transfers the property to a third person who is not a bona fide purchaser, the interest of the beneficiary is not cut off. In such a case, he can maintain a suit in equity to recover the property from the third person, at least if his remedies at law are not adequate.

Horton, 513 F.3d at 1223 (quoting Restatement of Restitution § 160 cmt. g (1937)). The Horton court went on to conclude that:

> In the instant case, the Administrative Committee properly seeks equitable restitution of a specifically identifiable fund in possession of a defendant. As required by Knudson, the [Plan] asserts title and right to possession of particular property that is in the hands of Mrs. Werber in her capacity as Joshua's conservator. The money Mrs. Werber holds in trust has been identified as belonging in good conscience to the [Plan] by virtue of the Plan's terms, and the money can clearly be traced to a particular fund in the defendant's possession. The fact that Mrs. Werber holds the funds as a third party does not defeat the [Plan's] claim. Under Knudson, Sereboff, and the other authorities cited above, the most important consideration is not the identity of the defendant, but rather that the settlement proceeds are still intact, and thus constitute an identifiable res that can be restored to its rightful recipient. Had the Administrative Committee solely sued parties not in possession of the disputed funds, the claim would have failed under Knudson because it merely would have sought to impose personal liability on those parties.

Id. at 1228-29.

Importantly, Sereboff did not address the issue of a beneficiary's dissipation of assets because the funds there were placed in a separate account throughout the duration of the case. The Eleventh Circuit has similarly not had occasion to address this issue of dissipation. However, the overwhelming majority of circuit courts to have done so have held, after interpreting Sereboff, that a beneficiary's dissipation of assets is immaterial when a fiduciary asserts an equitable lien by agreement. See Cusson v. Liberty Life Assurance Co. of Bos., 592 F.3d 215, 231 (1st Cir. 2010) (an ERISA plan administrator need not identify a "specific account in which the funds are kept or prove[ ] that they are still in [the beneficiary's] possession"); Thurber v. Aetna Life Ins. Co., 712 F.3d 654, 664 (2d Cir. 2013)("[I]n the context of an equitable lien by agreement, rather than an equitable lien sought as a matter of restitution, all that matters is that the beneficiary did, at some point, have possession and control of the specific portion of the particular fund sought by the insurer."); Funk v . CIGNA Grp. Ins., 648 F.3d 182, 194-95 (3d Cir. 2011)("dissipation of the funds [is] immaterial" if an equitable lien by agreement is in place); ACS Recovery Servs., Inc . v . Griffin, 723 F.3d 518, 526 (5th Cir. 2013) cert. denied, 134 S. Ct. 618 (2013)(employee need not have possession and control of funds for ERISA plan fiduciaries to seek recovery); Longaberger Co. v. Kolt, 586 F.3d 459, 466 (6th Cir. 2009)("[A]n equitable lien by agreement does not require tracing or maintenance of a fund in order for equity to allow repayment."); Gutta v. Standard Select Trust Ins. Plans, 530 F.3d 614, 621 (7th Cir. 2008)(equitable lien by agreement "is not dependent on the ability to trace particular funds [and group disability insurer] may bring its counterclaim under 29 U.S.C. § 1132(a)(3) even if the benefits it paid [the beneficiary] are not specifically

traceable to [the beneficiary's] current assets because of commingling or dissipation "); but see Bilyeu v. Morgan Stanley Long Term Disability Plan, 683 F.3d 1083, 1093-95 (9th Cir. 2012)("Nothing in Sereboff suggests that a fiduciary can enforce an equitable lien against a beneficiary 's general assets when specifically identified funds are no longer in a beneficiary's possession.").

Following the majority view, the Court concludes that any dissipation of the settlement funds by Defendant is immaterial. The present case is analogous to Sereboff in that an operative Plan provision clearly provides that the Plan is entitled to the reimbursement of benefits paid out in the event of a beneficiary's recovery from a third party: "The Plan has the right to recover benefits advanced by the Plan to a covered person for expenses or losses caused by another party." (DE 36-4 at 26). Further, "[t]he Plan has a right to first reimbursement out of any recovery " and "[a]cceptance of benefits from the Plan for an injury or illness by a covered person, without any further action by the Plan and/or the covered person, constitutes an agreement that any amounts recovered from another party by award, judgment, settlement or otherwise, and regardless of how the proceeds are characterized, will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan " (Id.). These provisions put Defendant on clear notice that any third-party recovery he received "by award, judgment, settlement or otherwise" belonged, as a matter of first right, to the Plan. By virtue of this clear pre-existing agreement, an equitable lien by agreement arose for the benefit of Plaintiff when Defendant obtained the third-party settlement under which he would receive monetary compensation for his accident-related injuries. In other words, Defendant's right to receive money from the settlement immediately became subordinate to the

Plan's lien. The settlement proceeds represent an identifiable fund to which the Plan's lien attached and such proceeds belong "in good conscience" to the Plan to the extent of the medical expenses it paid on Defendant's behalf. Such a conclusion is entirely consistent with the rationale of Sereboff and the "familiar rul[e] of equity" recited therein.

The Plan actively pursued its right to reimbursement first through a pre-suit process of negotiation and then—when that process proved unsuccessful—by filing this ERISA suit. That Defendant may have dissipated the funds over which Plaintiff holds a valid equitable lien by agreement is insufficient to void Plaintiff's right to enforce the reimbursement provision and the resulting equitable lien by agreement in Plaintiff's favor. See Funk, 648 F.3d at 194 (if "there was an equitable lien by agreement that attached to the [third-party benefits] as soon as [the beneficiary] received it, dissipation of the funds [is] immaterial").

Defendant argues that the Court should follow decisions out of the Middle District of Florida that run contrary to the majority of case law interpreting Sereboff in the context of an ERISA beneficiary's dissipation of assets. See, e.g., Jones v. Fed. Exp. Corp., 2013 WL 6038734 (M.D. Fla. Nov. 14, 2013); Epolito v. Prudential Ins. Co. of Am., 737 F.Supp.2d 1364 (M.D. Fla. 2010); Herman v. Met. Life Ins. Co., 689 F.Supp.2d 1316 (M.D. Fla. 2010). The Court respectfully disagrees with these decisions, which generally subscribe to the view espoused in Knudson that the dissipation of property such that "no product remains" means that a plaintiff cannot enforce an equitable lien upon other property of the defendant as such plaintiff's claim is only that of a general creditor. Jones, 2013 WL 6038734 at *25. Citing post-Sereboff Eleventh Circuit precedent for

the proposition that "equitable relief under ERISA continues to require that the fiduciary identify specific assets still in the possession of the beneficiary[,]" these decisions conclude that a requirement of extant and identifiable specific property maintains a proper distinction "between equitable restitution and a money judgment." Id. at *22-23, 26 (citing Green v. Holland, 480 F.3d 1216, 1225-26 (11th Cir. 2007); Horton, 513 F.3d at 1226-27).

While reasonable jurists can certainly disagree on this issue, the Court is unpersuaded by the above Middle District of Florida decisions as they relate to dissipation of assets. As recognized by the Eleventh Circuit, Sereboff emphasized that the funds in issue "had been specifically identified (via the third party recovery provision of the plan itself); that the funds were still in the defendant's possession; and that it was undisputed that the plaintiff was entitled to them under the plan 's terms." Holland, 480 F.3d at 1225 (citing Sereboff, 547 U.S. at 362- 63). Here, the funds in issue have been specifically identified (via the provisions providing for Plaintiff's right to be reimbursed out of any third party recovery) in a specific amount ($121,044.02) as authorized by the Plan. These funds were entrusted first to Defendant's counsel, then to Defendant.

This Court's departure from the analysis in the Middle District of Florida cases turns on the requirement that the funds "still be in the defendant's possession." To conclude that Defendant's post-settlement dissipation of funds would defeat Plaintiff's reimbursement claim would be to wholly ignore the rationale of Sereboff. Without Defendant's injury, there would have been no Plan payments for his medical expenses or the later settlement. As discussed above, when Defendant agreed to the third-party settlement

under which he would receive monetary compensation for his accident-related injuries, an equitable lien by agreement arose for the benefit of Plaintiff. The settlement proceeds represent an identifiable fund originally within the Defendant's possession to which the Plan's lien has attached and such lien is not dependent on the ability to trace the funds in real-time. To hold otherwise "would make § 1132(a)(3)(B)(ii) an empty promise" based on the important principle that "ERISA provides for equitable remedies *to enforce plan terms.*" Sereboff, 547 U.S. at 363 (emphasis in original). To hold otherwise would also open the door to the type of "outrageous" conduct recently censured by the Seventh Circuit, to wit, dissipation of settlement proceeds by a lawyer and client in knowing and willful ignorance of an ERISA plan's lien against the settlement proceeds. Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Lewis, 2014 WL 943412, *4 (7th Cir. Mar. 12, 2014).

IV. CONCLUSION

Based on the foregoing, the Court concludes that Plaintiff has a right under Summary Plan Description's "Other Party Liability Claims" provision to seek reimbursement for the monies it paid to cover Defendant's medical expenses arising from his 2008 car accident, for which Defendant has obtained a third-party settlement. The Court further concludes that such reimbursement constitutes "appropriate equitable relief" within the meaning of ERISA, 29 U.S.C. § 1132(a)(3)(B).

Accordingly, the Court ORDERS that Plaintiff s Motion for Summary Judgment (DE 36) is GRANTED, and Defendant's Motion for Summary Judgment (DE 35) is DENIED. Pursuant to Federal Rule of Civil Procedure 58(a), the court will enter a Final Judgment by separate order.

DONE and ORDERED in Chambers at West Palm Beach in the Southern District of Florida, this 17th day of March, 2014.

DAVE LEE BRANNON
U.S. MAGISTRATE JUDGE

APPENDIX C

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 13-11738 & 13-14912

AIRTRAN AIRWAYS, INC.,

Plaintiff-Appellee,

v.

BRENDA ELEM, MARK D. LINK, and LINK & SMITH, P.C.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
D.C. Civil Action No. 1:10-cv-03673-ODE

Before: WILLIAM PRYOR and MARCUS, *Circuit Judges*, and HONEYWELL,* *District Judge*.

Filed: September 23, 2014

* Honorable Charlene Edwards Honeywell, United States District Judge for the Middle District of Florida, sitting by designation.

OPINION OF THE COURT

PRYOR, *Circuit Judge.*

This appeal requires us to decide whether an employee welfare benefit plan may recover medical costs it spent on behalf of a beneficiary after she and her attorney conspired to hide and disburse settlement funds she received after a car accident. Brenda Elem participated, as an employee of AirTran, in a self-funded employee welfare benefit plan. After Elem suffered injuries in a car accident and the plan paid over $100,000 for her medical care, Elem sued the other driver and settled for $500,000. AirTran sought reimbursement from Elem, but Elem's attorney, Mark Link, misrepresented that Elem had settled for only $25,000. Link's sin then found him out, *see* Numbers 32:23, when he accidentally sent the plan a copy of a settlement check for $475,000. After AirTran sued Elem, Link, and Link & Smith, P.C., for violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(a)(3), the district court granted summary judgment and awarded attorney's fees and costs in favor of AirTran.

Elem, Link, and the law firm challenge three orders. They contest the summary judgment on the ground that AirTran failed to satisfy the strict tracing rules of equitable restitution, but these rules do not apply to the equitable lien by agreement that the AirTran plan created. *See Sereboff v. Mid Atlantic Med. Serv., Inc.*, 547 U.S. 356, 364–65, 126 S. Ct. 1869, 1875 (2006). Elem and Link argue that the district court abused its discretion when it awarded AirTran attorney's fees and costs, but the district court had the authority to sanction them for their bad faith. Elem and Link also complain that the district court misapplied Federal Rule of Civil Procedure

70 when the court ordered enforcement of the judgment, but that issue became moot when Link and his law firm complied with the order. We affirm the summary judgment and award of fees and costs and dismiss as moot the appeal of the order to enforce the judgment.

I. BACKGROUND

In 2007, Brenda Elem sustained injuries in a car accident. Her employer, AirTran, paid $131,704.28 for her medical care as a result of her participation in its self-funded employee welfare benefit plan. The plan designated Elem as a constructive trustee over any payments recovered from third parties and created an equitable lien for the amount of benefits paid by the plan. Under the plan, when Elem accepted her medical benefits from AirTran, she acknowledged that AirTran had a first priority claim to all payments made by a third party, even if that third party failed to pay the full amount of her damages. Months after the accident, the plan administrator advised Elem that, if she sued the driver of the other vehicle, Migel Rizo, the terms of the plan required Elem to reimburse AirTran with proceeds from that suit. And the plan administrator also advised Rizo's insurer, AIG, of that right to reimbursement.

In September 2007, when Elem contacted AIG to settle the claim against Rizo within his liability policy limits of $25,000, she misrepresented that the plan would have no lien against any funds she would recover from AIG. She also stated that she intended to sue Rizo for the full amount of her damages if AIG refused to pay the $25,000. AIG responded that Rizo's policy limit was $25,000 and that it would be willing to issue a settlement check for that amount to Elem if her plan "waive[d] their

subrogation lien" or to Elem and the plan if the plan did not waive the lien.

Elem hired Mark Link of Link & Smith, P.C., as her attorney and sued Rizo for the injuries she sustained in the accident. AIG advised Link that it had offered

$25,000 to Elem, but that AIG had notice of a lien and a duty to protect its insured. In December 2007, the plan administrator for AirTran notified Link of the lien in favor of AirTran.

Rizo and Elem later settled their lawsuit for $500,000. During the negotiation of their settlement agreement, Link asked AIG to prepare two releases: one reflecting payment of the policy limit of $25,000 and another for $475,000 in settlement of Rizo's claim of bad faith. Link also requested two separate checks and demanded that the $25,000 release not mention Rizo's release of his claim of bad faith. AIG responded that "it seems deceptive" to omit Rizo's release of his claim, but Link got his way.

Elem executed a release in favor of AIG for $25,000 and another release for $475,000 signed also by Rizo. AIG issued two separate settlement checks to Elem, Link, and Link & Smith, one for $25,000 and another for $475,000. Elem later received $274,184.08; Link & Smith retained $190,000.00 for attorney's fees and $10,815.92 for expenses; and Link & Smith kept the remaining funds of $4,500.00 in an escrow account.

When Link informed the plan administrator about the settlement, he stated that Elem had settled her claim against Rizo for the policy limit of $25,000 and "has abandoned any hope of recovering" more than that amount. Although Link intended to enclose a copy of the $25,000 check as proof of that settlement, he

inadvertently enclosed a copy of the $475,000 check. The plan administrator noticed the error and demanded reimbursement from "[a]ll [s]ettlements and [j]udgments."

When Elem refused to reimburse the plan, AirTran filed suit against Elem, Link, and Link & Smith. The parties filed cross motions for summary judgment, and the district court granted summary judgment in favor of AirTran. The court then awarded AirTran attorney's fees in the amount of $145,723.28 and costs in the amount of $3,692.52.

When Link still refused to pay, AirTran filed a motion to enforce the judgment under Federal Rule of Civil Procedure 70. Elem and Link responded that Rule 70 was inapplicable because the judgment against them was for money damages enforceable only through a writ of execution. The district court granted the motion and ordered Elem and Link to satisfy the full amount of the judgment or post a bond. AirTran later moved to hold Elem and Link in contempt when they refused to comply with the order, but AirTran withdrew the motion when Link and Link & Smith eventually paid the full amount of the judgment and attorney's fees and costs. At oral argument, the parties stipulated that Link and his firm conditioned this payment on the disposition of the appeal of the summary judgment and the award of attorney's fees and costs.

II. STANDARDS OF REVIEW

Two standards of review govern us. First, we review *de novo* a summary judgment and draw all inferences and review all evidence in the light most favorable to the nonmoving party. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012). Summary

judgment should be granted only when the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Id.* We also review the mootness of an appeal *de novo*. *Tanner Adver. Grp., L.L.C. v. Fayette Cnty., Ga.*, 451 F.3d 777, 784 (11th Cir. 2006). Second, we review for abuse of discretion an award of attorney's fees and costs. *Byars v. Coca-Cola Co.*, 517 F.3d 1256, 1263 (11th Cir. 2008).

III. DISCUSSION

Elem and Link contest the summary judgment in favor of AirTran, the award of fees and costs, and the issuance of the Rule 70 order to enforce the judgment, but their arguments fail. We discuss each order of the district court in turn.

A. The District Court Correctly Granted Summary Judgment in Favor of AirTran.

We divide this section in two parts. We first discuss Elem and Link's challenge to the summary judgment in favor of AirTran on the ground that AirTran failed to seek equitable relief. We second discuss Elem and Link's attempts to avoid liability based on four technicalities, none of which justify the breach of their fiduciary duty.

1. AirTran seeks appropriate equitable redress.

The Act permits AirTran to file a civil action "to obtain . appropriate equitable relief . . to redress" the misdeeds of Elem, Link, and Link & Smith. 29 U.S.C. § 1132(a)(3) (B). "[A]ppropriate equitable relief" includes only "those categories of relief that were *typically* available in equity," *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S. Ct. 708, 712 (2002). Elem and Link argue that AirTran cannot recover Elem's medical costs because AirTran seeks money damages, a legal remedy, but AirTran contends that the

plan created an equitable lien by agreement over the settlement funds. AirTran argues that it seeks to recover "specifically identifiable funds" in "the possession and control" of Elem and Link, that the plan created an equitable lien by agreement, and that its claim, therefore, falls within "appropriate equitable relief" allowed under the Act. *Sereboff*, 547 U.S. at 362–63, 126 S. Ct. at 1874 (internal quotation marks omitted).

This case sounds in equity. When AirTran filed suit against Elem and Link, it did so to enforce the equitable lien by agreement created by the plan. In "the days of the divided bench," this suit would have been equitable in nature. *See id.* at 363–65, 126 S. Ct. at 1874–76. Like the plan in *Sereboff*, the unambiguous terms of the AirTran plan created an equitable lien against any settlement funds that Elem received as a result of her accident. As soon as AIG gave Elem the settlement funds, AirTran "could follow it into the hands of [Elem and Link]." *Barnes v. Alexander*, 232 U.S. 117, 123, 34 S. Ct. 276, 278 (1914).

We must also ensure that the nature of the remedy AirTran seeks is equitable. *Compare Sereboff*, 547 U.S. at 361–63, 126 S. Ct. at 1873–74, *with Knudson*, 534 U.S. at 212–14, 122 S. Ct. at 714–15. Elem and Link are correct that the remedy of money damages is quintessentially a remedy at law. For that reason, a plan may not file suit against a beneficiary for reimbursement and seek recovery from "assets generally" of that beneficiary, because that suit would seek legal, not equitable, restitution. *Sereboff*, 547 U.S. at 363, 126 S. Ct. at 1874 (distinguishing *Knudson*). But when a plan seeks "specifically identifiable funds" in "the possession and control" of a beneficiary, such restitution of the funds is

equitable in nature. *Id.* at 362–63, 126 S. Ct. at 1874 (internal quotation marks omitted).

AirTran seeks an equitable remedy. AirTran filed suit to enforce its equitable lien over "specifically identifiable funds" that Elem had in her "possession." *See Sereboff*, 547 U.S. at 362–63, 126 S. Ct. at 1874 (internal quotation marks omitted). According to the plain terms of the plan, the settlement that AIG paid to Elem constitutes the specifically identifiable funds over which AirTran had a lien. Elem and Link attempt to liken those settlement funds to the funds in *Knudson*, but, unlike the beneficiary in *Knudson*, Elem possessed the funds. *Id.* (distinguishing *Knudson* on the ground that the beneficiary never possessed the settlement fund); *see also Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654, 664 (2d Cir. 2013) ("[A]ll that matters is that the beneficiary did, at some point, have possession and control of the specific portion of the particular fund sought by the insurer."). Once she possessed those funds, the equitable lien by agreement attached to them, making them "specifically identifiable." *Sereboff*, 547 U.S. at 362–63, 126 S. Ct. at 1874.

We disagree with our dissenting colleague, who adopts the position of the Ninth Circuit and concludes that AirTran cannot collect what it is owed because it has not traced the settlement funds after Elem divided them with her attorney. (Dissenting Op. at 30–33). *See Bilyeu v. Morgan Stanley Long Term Disability Plan*, 683 F.3d 1083, 1095 (9th Cir. 2012) ("Nothing in *Sereboff* suggests that a fiduciary can enforce an equitable lien against a beneficiary's *general assets* when specifically identified funds are no longer in a beneficiary's possession."). It matters not whether the settlement funds have since been disbursed or commingled with other funds. In *Sereboff*, the Supreme Court made clear

that AirTran need not trace the settlement fund back to AirTran to enforce its equitable lien by agreement. *Id.* at 364–65, 126 S. Ct. at 1875–76. As soon as the settlement fund was identified, the plan imposed an equitable lien over that fund even though it was in the hands of the beneficiaries. *Id.* at 363–64, 126 S. Ct. at 1875. And in the wake of *Sereboff*, our sister circuits have concluded that "[p]roperty to which the lien attached may be converted into other property without affecting the efficacy of the lien." *Funk v. CIGNA Grp. Ins.*, 648 F.3d 182, 194 (3d Cir. 2011); *see Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Lewis*, 745 F.3d 283, 285 (7th Cir. 2014) ("The defendants argued . . that because the settlement funds have been dissipated, this really is a suit for damages . But the defendants are wrong."); *Thurber*, 712 F.3d at 663–64 ("[T]he beneficiary's literal segregation of funds is irrelevant when the terms of the plan put the beneficiary on notice that she would be required to reimburse the insurer for an amount equal to what she might get from third-party sources." (alterations and internal quotation marks omitted)); *Cusson v. Liberty Life Assurance Co. of Boston*, 592 F.3d 215, 231 (1st Cir. 2010); *Longaberger Co. v. Kolt*, 586 F.3d 459, 466–67 (6th Cir. 2009); *see also Popowski v. Parrott*, 461 F.3d 1367, 1374 n.8 (11th Cir. 2006) ("[T]he fact that the third-party recovery triggering the [p]lan's reimbursement provision was comingled, even absent tracing, would not have disqualified an equitable lien had that equitable lien been *by agreement* "). We join those circuit courts and conclude that, even though Elem willfully refused to abide by the terms of the AirTran plan, her dereliction as a constructive trustee could not destroy the lien that attached *before* Elem divided the funds with her attorney. *See Barnes*, 232 at 122, 34 S. Ct. at 278

(explaining that the lien often attaches before the specific funds exist). Elem and Link argue that AirTran may take only the remaining $4,500 of settlement funds left in the escrow account, but they misunderstand that the plan imposed a lien for the entire $131,704.28 of medical benefits paid, which attached when Elem obtained the settlement funds. Contrary to Elem and Link's argument, these "specifically identifiable funds" did not disappear when they divided the money.

By the terms of the plan, AirTran paid for Elem's medical care and, as a result, could enforce it the moment Elem possessed the settlement checks from AIG. Even though Elem and Link distributed the funds, the *res* remained the same: the amount of the medical benefits paid to Elem. *See Barnes*, 232 U.S. at 122, 34 S.Ct. at 278. Elem and Link cannot defeat the first priority lien of AirTran, and Elem cannot abandon her duties as trustee under the constructive trust by commingling the *res* with other funds. *See Gutta v. Standard Select Trust Ins. Plans*, 530 F.3d 614, 621 (7th Cir. 2008) ("[The insurer] may bring its counterclaim [for reimbursement] even if the benefits it paid Gutta are not specifically traceable to Gutta's current assets because of commingling or dissipation."). Their dishonesty and manipulation of the settlement funds cannot destroy the lien of AirTran over the "specifically identifiable" monies.

2. Elem and Link's remaining arguments about the summary judgment are meritless.

Elem and Link raise four additional arguments, none of which we find persuasive. First, Link and Link & Smith argue that AirTran cannot recover from them as third-party attorneys. Second, Elem and Link argue that, when AIG funded the $475,000 portion of the settlement, AIG no longer qualified as a "responsible party" under

the plan. Third, they argue that AirTran cannot force Elem to reimburse it because AirTran never disclosed to her the plan terms. Fourth, Elem seeks to avoid liability by arguing that, because the plan administrator provided healthcare services, AirTran cannot sue to enforce its right to reimbursement. We address each of these arguments in turn.

Link and Link & Smith argue that they are not proper defendants because AirTran cannot seek reimbursement from a third-party attorney, but that argument fails. A plan may recover from a nonfiduciary party in interest, even if that party has not violated a duty expressly imposed by the Act. *Harris Trust & Sav. Bank v. Saloman Smith Barney, Inc.*, 530 U.S. 238, 245, 120 S. Ct. 2180, 2186–87 (2000). Because Elem breached her fiduciary duty as trustee and transferred the trust property to Link and Link & Smith, the attorneys took the property subject to the trust, unless they purchased the property for value and without notice of the fiduciary's breach of duty. *Id.* at 250, 120 S. Ct. at 2189. Even if Link and Link & Smith were not the original wrongdoers, they are not insulated from liability for restitution. *Id.* at 251, 120 S. Ct. at 2189; *see also Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 357–58 (5th Cir. 2003), *abrogated on other grounds*, *ACS Recovery Serv., Inc. v. Griffin*, 723 F.3d 518 (5th Cir. 2013) (en banc). And Link and Link & Smith are hardly innocent parties. Link and his firm tried to hide the full amount of the settlement agreement from AirTran. Link represented that the $25,000 would take care of any liens on the settlement asserted by AirTran, but paid himself and his firm $200,815.92. Even if they had not known of the first priority lien of AirTran, they could not defeat the lien, but the record makes clear that the plan

administrator had repeatedly notified Link and Link & Smith that AirTran had an equitable lien and intended to enforce it.

Link and his firm knew that they took fees and costs subject to the lien held by AirTran, and they cannot now avoid liability by asserting that they did not agree to the terms of the plan. The lien arose before they entered into a contingency fee arrangement with Elem, and Elem agreed to the terms of the plan long ago. She agreed that "[t]he Plan is not required to participate in or pay court costs or attorney fees to any attorney hired by [Elem] to pursue [Elem]'s damage claim." These obligations, which "precluded [Elem] from contracting away to the law firm that which [she] did not own [herself], namely, the right to all or any portion of the [sum] that rightfully belonged to the Plan," predated her attorney-client relationship with Link and his firm. *Bombardier*, 354 F.3d at 357. That Link and his firm disregarded the first priority lien of AirTran and commingled the settlement funds does not defeat the claim for equitable relief by AirTran because, "under *Sereboff*, [AirTran] was free to follow a portion of the settlement funds into [Link and Link & Smith's] hands." *Longaberger Co.*, 586 F.3d at 469.

Elem and Link argue too that Elem could not have wrongfully transferred the settlement funds because Elem never had "possession" of those funds. They explain that AIG transferred the funds to Link and his firm. They argue that, because Elem never possessed the funds, her duty to reimburse AirTran was never triggered.

Nonsense. Even if AIG wrote and delivered the checks to Link and his firm, Elem "had at least constructive possession and control of the fund[s] to facilitate the settlement." *Griffin*, 723 F.3d at 529

("Griffin's attempt to divorce himself from the origin of the fund and its disposition is no more persuasive than if he had directed the money to a close relative. [H]e could not give away that which he did not possess."). And here, Elem likely had "actual possession" because her attorney, as her agent, received and deposited the checks.

Elem and Link also argue that AirTran cannot seek reimbursement because AIG is not a "responsible party" under the terms of the plan. They argue that, when AIG paid the $475,000 check, AIG no longer qualified as a "responsible party" for the purposes of reimbursement because AIG was no longer providing "liability coverage" for Rizo, but this argument contravenes the plain terms of the plan.

The terms of the plan entitle AirTran to reimbursement from "any payment" from "any Responsible Party as a result of an injury, illness, or condition." The plan defines "Responsible Party" as "any party actually, possibly, or potentially responsible for making any payment to a Covered Person due to a Covered Person's injury, illness or condition[, which] includes the liability insurer of such party or any insurance coverage." Because AIG settled the lawsuit for $500,000, it meets the definition of a "responsible party." It matters not at all that Rizo's policy limits were only $25,000 because the terms of the plan allow AirTran to recover "any payment" to Elem "due to" her injury. AirTran now may seek its "specifically identifiable" amount from the $500,000 for medical expenses paid on behalf of Elem.

Elem and Link also attempt to evade liability by arguing that AirTran cannot force Elem to reimburse AirTran because she never saw the plan documents, but Elem accepted the benefits and is bound by the terms of

the plan unless AirTran prejudiced Elem by its failure to disclose them. Our Court has said that "the quantity of an employer's procedural violations," such as failure to abide by disclosure requirements, "may work a substantive harm." *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1499 (11th Cir. 1987). But an employee must establish that she was prejudiced by an infraction committed by the plan. *See Hein v. TechAmerica Grp., Inc.*, 17 F.3d 1278, 1280–81 (10th Cir. 1994); *see Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991) (requiring bad faith, active concealment, or inducement to rely on a faulty plan summary by an administrator before a court will award recovery for procedural violations).

Elem has not alleged that AirTran committed a multitude of procedural violations or that she was prejudiced by any nondisclosure. Nor can she. The plan administrator repeatedly sent letters expressing its intent to pursue reimbursement. And Elem allowed AirTran to pay over $130,000 of her medical bills. Elem knew of the lien before disbursing the funds to herself and to her attorney, and she cannot avoid liability on a technicality. *See Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst.*, 404 F.3d 167, 171–72 (2d Cir. 2005) ("Where a plan administrator fails to fulfill its statutory duty , but where the evidence shows that the claimant had actual knowledge of the requirement at issue, the error is necessarily harmless.").

Finally, Elem and Link argue that AirTran lacks standing to seek reimbursement of Elem's medical costs that the plan administrator paid, but they misunderstand the nature of the self-funded employee benefit plan offered by AirTran. Under the terms of the plan, AirTran provided various benefit options to its employees and contracted with the plan administrator to provide various services, including network access, subrogation, and

patient management services. In the district court, Elem relied on language in the Benefits Enrollment Guide, which refers to healthcare services provided by the plan administrator, but the provision of those administrative services does not give the plan administrator the right to seek reimbursement from Elem. Instead, AirTran still paid for all expenses incurred by its participants, including Elem. We reject Elem and Link's argument that AirTran cannot now recover its costs because it contracted with the plan administrator.

B. The District Court Did Not Abuse Its Discretion by Awarding Attorney's Fees and Costs to AirTran.

A district court, "in its discretion," may award attorney's fees to a party, 29 § 1132(g)(1), if that party achieved "some degree of success on the merits," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255, 130 S. Ct. 2149, 2158 (2010). We require district courts to consider five factors when deciding whether to award fees to a prevailing party:

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorney's fees;
>
> (3) whether an award of attorney's fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; [and] (5) the relative merits of the parties' positions.

Freeman v. Continental Ins. Co., 996 F.2d 1116, 1119 (11th Cir. 1993). We have explained that "[n]o one of these factors is necessarily decisive, but together they are

the nuclei of concerns that a court should address." *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980).

Elem and Link argue that the district court unjustly awarded AirTran attorney's fees, but the five *Freeman* factors support the award. First, we rarely see such a textbook example of "bad faith." Link intentionally attempted to deceive the plan administrator when he sent the letter stating that $25,000 represented the entire settlement amount. And he coerced AIG to draft two separate releases to effectuate his deception. Fortunately for AirTran, his scheme came crashing down when he sent a copy of the $475,000 check to the plan administrator. His actions no doubt evince bad faith. Second, Link and Link & Smith have already satisfied the award, although conditionally. Third, an award of attorney's fees in this circumstance would help deter others from cheating their employee benefit plan. Fourth, the award protects plan assets, which benefit all plan participants. And fifth, the defense mounted by AirTran was highly meritorious. The district court did not abuse its discretion when it awarded attorney's fees to AirTran.

C. The Payment of the Award of Fees and Costs Moots Any Argument About the Entry of the Rule 70 Order by the District Court.

Elem and Link argue that the district court misinterpreted Federal Rule of Civil Procedure 70 when it ordered them to pay the full amount of the judgment and fees and costs. Rule 70 provides, "If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party's expense—by another person appointed by the court."

Rule 70 "gives the district court a discrete and limited power to deal with parties who thwart final judgments by refusing to comply with orders to perform specific acts." *Analytical Eng'g, Inc. v. Baldwin Filters, Inc.*, 425 F.3d 443, 449 (7th Cir. 2005). Elem and Link contend that the district court erroneously converted a final money judgment at law into an injunction and that the judgment was enforceable only through a writ of execution.

This issue is no longer justiciable because the appeal of the order is now moot. Instead of posting a supersedeas bond, Link and his firm paid the full amount due to AirTran to avoid being held in contempt. Even if we agreed that the district court erred when it issued that order, we could not grant any meaningful relief because the defendants have already complied with it. *See Bradford Marine, Inc. v. M/V Sea Falcon*, 64 F.3d 585, 587 n.1 (11th Cir. 1995); *Fidelcor Mortg. Corp. v. Ins. Co. of N. Am.*, 820 F.2d 367, 370 (11th Cir. 1987) ("When it executed the satisfaction of the judgment, it included no reservation allowing it to proceed with an appeal on some issues; it satisfied the judgment in toto. Therefore, there is nothing left from which it may appeal."). No case or controversy about the merits of the Rule 70 order remains after the payment. *See RES-GA Cobblestone, LLC v. Blake Constr. & Dev., LLC*, 718 F.3d 1308, 1314 (11th Cir. 2013) ("Where no legally cognizable interest is at stake between the parties, a case becomes moot. This is so no matter how vehemently the parties continue to dispute the issues that animated the litigation." (internal quotation marks and citation omitted)).

We are befuddled by our dissenting colleague's contrary conclusion. (Dissenting Op. at 36–39). At oral argument, when we asked counsel for Elem, Link, and Link & Smith what injury they now suffered as a result of the Rule 70 order even though they had paid the

judgment, he answered, "Any injury now, perhaps not." We reiterate that because Link and Link & Smith have complied with the Rule 70 order by paying the judgment, we cannot afford them any meaningful relief even if that order was in error.

IV. CONCLUSION

We **AFFIRM** the summary judgment and award of attorney's fees and costs in favor of AirTran and **DISMISS** as moot the appeal of the order under Rule 70.

MARTIN, *Circuit Judge*, dissenting.

AirTran Airways, Inc. (AirTran) says that its suit seeks equitable relief, but it fails to make a critical showing for purposes of equity: that the defendants remain in possession of the disputed property. For the reasons that follow, I have come to understand that AirTran's suit seeks a legal remedy which is not permitted under the statute it relies on. Based on this understanding, I would reverse the District Court's grant of summary judgment in favor of AirTran, its order awarding attorney's fees and costs, and its later Rule 70 order enforcing the judgment.

I. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT BY CLASSIFYING AIRTRAN'S CLAIMS AS EQUITABLE.

At issue is whether AirTran's suit against Brenda Elem, her attorney Mark Link, and his law firm Link & Smith, P.C. (Link & Smith) (collectively the defendants) to recover settlement funds subject to an equitable lien by agreement is permitted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(3)(B). This statute gives courts the power to grant "other appropriate equitable relief" only when enforcing a covered insurance plan. Specifically, a plan

fiduciary may bring a civil action under ERISA "to obtain other appropriate equitable relief . . to enforce the terms of the plan." 29 U.S.C. § 1132(a)(3)(B)(ii). The Supreme Court has construed this section to authorize only "those categories of relief that were typically available in equity." Mertens v. Hewitt Assocs., 508 U.S. 248, 256, 113 S. Ct. 2063, 2069 (1993). Thus, the statute offers no relief for legal claims. Whether a remedy is "legal or equitable depends on the basis for [the plaintiff's] claim and the nature of the underlying remedies sought." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213, 122 S. Ct. 708, 714 (2002) (alteration in original) (internal quotation marks omitted).

I certainly recognize that AirTran's claim here is one arising in equity. The clear terms of the insurance plan created an equitable lien by agreement over the money Ms. Elem got as a result of her third party suit from the moment she had actual or constructive possession of that money. However, on the facts before us, the only remedy available to AirTran is legal, not equitable, in nature. Money damages are traditionally a remedy at law, but can be equitable if the plaintiff seeks: (1) "specifically identifiable funds" in (2) the defendant's "possession and control." Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 362–63, 126 S. Ct. 1869, 1874 (2006) (internal quotation marks omitted). AirTran properly identified specific funds, but failed to establish that the identifiable funds are "in the possession and control" of the defendants. The remedy AirTran seeks is therefore a legal one and is not permitted under 29 U.S.C. § 1132(a)(3)(B).

A. A MONEY DAMAGE AWARD IS ONLY EQUITABLE IF THE DEFENDANT REMAINS IN POSSESSION.

Supreme Court precedent makes clear that a plaintiff proceeding in equity to recover funds from a defendant must, at a minimum, show that those funds are presently in the defendant's possession. In Walker v. Brown, 165 U.S. 654, 17 S. Ct. 453 (1897), the Supreme Court was asked to decide whether an equitable lien by agreement remained attached to certain Memphis city bonds in the hands of the widow of a businessman who pledged the bonds to plaintiff J. H. Walker & Co. (Walker). That businessman, Mr. Brown, had actually pledged the bonds to Walker for the benefit of a third party. As that third party got into financial difficulties, Mr. Brown paid its creditors the value of the bonds, retook possession of the bonds, and then gifted them to his wife before he passed away. The Supreme Court held that the lien by agreement was not extinguished when Mr. Brown bought them back, and that the "equitable lien will be enforced by a court of equity against the bonds in the hands of [Mrs.] Brown or against third persons who are volunteers or have notice." 165 U.S. at 664, 17 S. Ct. at 457 (emphasis added). The Supreme Court's discussion of available equitable relief turned on the current location and possession of the bonds. See also Ketchum v. St. Louis, 101 U.S. 306, 318 (1879) ("With that [equitable] lien the property itself was chargeable by whomsoever it or the funds accruing therefrom are or may be held.").

More recent cases also support the expectation that a defendant must still be in possession of the property subject to the lien to allow equitable recovery under 29 U.S.C. § 1132(a)(3)(B). The Supreme Court denied reimbursement in Knudson because the insurance company was not seeking to recover "particular funds or

property in the defendant's possession." 534 U.S. at 213, 122 S. Ct. at 714. The company sued Ms. Knudson, the beneficiary, instead of the trustee in charge of the Special Needs Trust where the money was held pursuant to California law. Because Ms. Knudson did not have the funds in her possession, the Court observed that the plaintiff's claim was "not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to some funds for benefits that they conferred." Id. at 214, 122 S. Ct. at 715. The Court held "where 'the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'" Id. at 213, 122 S. Ct. at 714 (alteration in original) (quoting Restatement of Restitution § 215, cmt. a, at 867); see also Restatement of Restitution § 215 cmt. b ("A person whose property is wrongfully taken by another is not entitled to priority over other creditors unless he proves that the wrongdoer not only once had the property or its proceeds, but still has the property or its proceeds or property in which the claimant's property or its proceeds have been mingled indistinguishably.").

In Sereboff, the Supreme Court noted that the "impediment to characterizing the relief in Knudson as equitable" was not present. Id. at 362, 126 S.Ct. at 1874. That is because, in contrast to Knudson, the plan administrator in Sereboff sought "particular funds or property in the defendant's possession," Knudson, 534 U.S. at 214, 122 S. Ct. at 708, where the identified fund was "preserved [in the Sereboffs'] investment accounts." Sereboff, 547 U.S. at 362–63, 126 S. Ct. at 1874 (alteration in original) (quoting Mid Atl. Med. Servs., LLC v.

Sereboff, 407 F.3d 212, 214 (4th Cir. 2005), aff'd sub nom. Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 126 S. Ct. 1869 (2006)).

This Court and other Circuit Courts have followed the Supreme Court's guidance that a defendant's current possession of the funds at issue is a necessary element of an equitable claim. See, e.g., Popowski v. Parrott, 461 F.3d 1367, 1373 (11th Cir. 2006) ("Unlike in Knudson, a significant portion of the funds specified went directly into the [insureds'] bank account and, thereby, was in their possession for purposes of this case. Thus, at the time they filed their suit, [the plan fiduciaries] sought 'not to impose personal liability on [the beneficiary], but to restore to the plaintiff[s] particular funds or property in [the beneficiary's] possession.'" (fourth alteration in original) (emphasis added) (quoting Knudson, 534 U.S. at 214, 122 S. Ct. at 714–15)); Treasurer, Trs. Of Drury Indus. Health Care Plan & Tr. v. Goding, 692 F.3d 888, 896 (8th Cir. 2012) ("In equity, there was no cause for restitution where the trustee of property wrongfully disposed of another's property, but no longer held that property or its product. A party who has been wrongfully divested of its property could only recover it if it proved not only that the other party once had property legally or equitably belonging to it, but also that he still holds the property or properties which is in whole or part its product." (citation omitted) (internal quotation marks and alterations omitted)); Bilyeu v. Morgan Stanley Long Term Disability Plan, 683 F.3d 1083, 1095 (9th Cir. 2012) (rejecting the argument that an equitable lien can be enforced against general assets when the specifically identified property has been dissipated); Loffredo v. Daimler AG, 500 F. App'x. 491, 499 (6th Cir. 2012) ("To plead claims for equitable relief the plaintiffs would have to allege either that the defendants currently (and

improperly) possess the assets dispersed from the trust or that they retain profits generated from that property."). In disagreeing with a case cited favorably by the majority, the Solicitor General of the United States also concluded that a plaintiff must establish the defendant's possession of the disputed funds to recover under this provision. See Brief for the United States as Amicus Curiae at 9, Thurber v. Aetna Life Ins. Co., et al., ___ U.S. ___, 134 S. Ct. 2723 (2014) (No. 13-130), 2014 WL 1783200 at *9 ("In the government's view, the court of appeals in this case erred in concluding that a plan fiduciary can enforce an equitable lien regardless of whether the funds at issue have been dissipated.").

B. AIRTRAN DID NOT ESTABLISH THAT DEFENDANTS HAVE POSSESSION OF THE SETTLEMENT FUNDS.

As soon as the settlement funds were transferred to the benefit of Ms. Elem, AirTran "could follow [those funds] into the hands" of the defendants. Panel Op. at 8 (quoting Barnes v. Alexander, 232 U.S. 117, 123, 34 S. Ct. 276, 278 (1914)). Once AirTran established who had the funds, its recovery against the person holding the funds would rightfully be classified as "equitable" according to Supreme Court and common law precedent. Yet what AirTran is entitled to do in equity, and what it actually did here, are very different things.

AirTran's complaint alleges "[u]pon information and belief, portion(s) of the funds to which the Plan is entitled are in the possession of Defendant Elem, Defendant Link and/or the Defendant Firm." AirTran's statement of material facts submitted in connection with its motion for summary judgment fails to offer any support for the allegation about possession made in its complaint. Though AirTran had ample opportunity in discovery to

inquire about the exact location of the distributed settlement money, it did not. Neither did AirTran ask the District Court for a restraining order or injunction to make sure that the funds were easy to identify once the case was resolved, as had happened in other reimbursement cases. See, e.g., Sereboff, 547 U.S. at 360, 126 S. Ct. at 1873 (noting that the Sereboffs agreed to preserve the disputed funds in an investment account until the suit was resolved); Popowski, 461 F.3d at 1370 ("[T]hey filed this suit along with a motion for a temporary restraining order and preliminary injunction to protect the settlement proceeds."). In its argument here, AirTran says that the "settlement funds could be followed into the hands of Elem, Link, and Link & Smith, P.C.," but it does not point to the money's current location. AirTran suggests that defendants engaged in "chicanery" by "concealing and then quickly 'spend[ing] all money received,'" but points to nothing in the record to support that proposition.

C. SEREBOFF'S LIMITATION ON "STRICT TRACING" DOES NOT IMPACT THIS CASE.

The majority forgives AirTran's failure to show defendants' possession of the settlement funds by stating that disbursal or commingling of the settlement funds is irrelevant to whether the claim is properly characterized as equitable. Ms. Elem, Mr. Link, and Link & Smith challenged the District Court's grant of summary judgment in part because AirTran did not establish that the funds it requested were still in the possession of any defendant. The majority says, mistakenly I believe, that the defendants' challenge is one "on the ground that AirTran failed to satisfy the strict tracing rules of equitable restitution." Panel Op. at 2. The majority then relies on Sereboff to reject this appeal. 547 U.S. at 364, 126 S. Ct. at 1875 (discussing the "strict tracing rules"

that applied to equitable restitution at common law). But I do not read Sereboff in the same way as the majority.

In Sereboff, the beneficiaries of an ERISA-covered health insurance plan received payment from the plan to cover medical expenses resulting from a car accident. The Sereboffs later settled a lawsuit they had filed regarding the car accident, and the terms of the plan called for the money paid in settlement to go to reimburse the administrator. The Sereboffs argued that recovery of settlement funds paid by a third party—and not directly from the plan—was not "equitable relief" under 29 U.S.C. § 1132(a)(3)(B) because "[t]he money in [the beneficiaries'] investment account cannot be traced to [the plan administrator]." Respondent Reply Brief at 9, Sereboff, 547 U.S. 356, 126 S. Ct. 1869 (No. 05-260), 2006 WL 717048 at *9. The Supreme Court rejected the Sereboffs' argument because "no tracing requirement of the sort asserted by the Sereboffs applies to equitable liens by agreement or assignment." Sereboff, 547 U.S. at 365, 126 S. Ct. at 1875. In support of its position, the Court turned to "case law from the days of the divided bench"—meaning cases heard during the period when the United States had two parallel courts, one of equity and one of law—which did not require the holder of an equitable lien by agreement to trace the res directly from the defendant back to the plaintiff. Id. at 363–64, 126 S. Ct. at 1874–75 (discussing Barnes, 232 U.S. at 199–23, 34 S. Ct. at 277–78).

In its discussion of strict tracing, the Supreme Court made a distinction between equitable liens sought as a matter of restitution and equitable liens by agreement. For equitable liens sought as a matter of restitution, strict tracing is required, but for equitable liens by agreement, it is not. Sereboff, 547 U.S. at 364–65, 126

S. Ct. at 1875–76. Further, the Court cabined its discussion of strict tracing to the type of tracing requirement "asserted by the Sereboffs." Id. at 365, 126 S. Ct. at 1875. As described above, the Sereboffs argued that equitable tracing required the plaintiff to trace the defendant's funds back to the plaintiff himself, and not to a third party. The Supreme Court rejected this argument, and held that equitable relief was still available where the plaintiff could not "identify an asset they originally possessed, which was improperly acquired and converted into property the defendant held." Id. (emphasis added). Later, this Court interpreted Sereboff's tracing language to eliminate only the requirement that disputed funds originate with the plaintiff. See Admin. Comm. for Wal-Mart Stores, Inc. Assocs.' Health & Welfare Plan v. Horton, 513 F.3d 1223, 1227 n.3 (11th Cir. 2008) ("[T]he Sereboff Court explained that strict tracing rules need not apply for an equitable lien to properly attach to the settlement funds; that is, although the disputed funds had never actually been in the possession of the plan, the plan could seek to 'recover' property that belonged to it in good conscience under the plan agreement." (emphasis added)).

The majority relies on what I believe is a misapplication of Sereboff, accepted by some of our sister circuits, to characterize the recovery of assets no longer in the defendant's possession as equitable relief. See, e.g., Cusson v. Liberty Life Assurance Co. of Boston, 592 F.3d 215, 231 (1st Cir. 2010) (determining that an insurer need not identify a "specific account in which the funds are kept or prove[] that they are still in [the defendant's] possession"). I do not accept this interpretation because the defendants in Sereboff were

still in possession of the funds—the Sereboff parties had stipulated that the funds were securely set aside in an investment account. See Sereboff, 547 U.S. at 360, 126 S.Ct. at 1873. So in Sereboff the Supreme Court was never asked to decide whether a defendant's possession at the time of the suit was necessary for an action in equity.

D. EQUITABLE RELIEF IS NOT AVAILABLE AGAINST DEFENDANTS WHO DO NOT HAVE POSSESSION OF THE DISPUTED PROPERTY.

If the settlement had instead been issued to Ms. Elem in the form of a luxury automobile, AirTran could exercise its equitable lien only by locating the automobile or the proceeds of the sale of the automobile and suing the person who had possession. It would make no sense to sue in equity to recover a car from someone who does not have it. And, the result is the same when a plaintiff brings a claim for "other equitable relief" without establishing who is in possession. At core, a plaintiff's ability to seek equitable relief over a res cannot be separated from the ongoing existence and location of that res or its proceeds. More to the point, we, as a court sitting in equity, cannot reverse engineer what happened to the plaintiff's property by assuming that one or more of the named defendants now has it. Yet, that is what the majority does here.

The District Court's grant of summary judgment entitled AirTran to recover the $131,704.28 it paid for Ms. Elem's medical expenses. The District Court later clarified that its "[j]udgment requires reimbursement of AirTran by all Defendants because all three possess settlement funds that belong 'in good conscience' to the Plan.'" The majority opinion repeats this idea that the

funds AirTran seeks to recover are "in 'the possession and control' of Elem and Link." Panel Op. at 8. But nothing in the record supports either conclusion. To the contrary, only Ms. Elem and Link & Smith received distributions from the settlement amount, and AirTran made no assertions about whether the money remained in their possession when it filed its motion for summary judgment. The record before us simply tells us nothing about where the money is. It could be disbursed, it could be commingled, or it could be tucked under Ms. Elem's mattress. By the District Court's order, Mr. Link is liable in equity for a res that he does not possess. Whatever retribution is appropriate for Mr. Link's "sin[s]," Panel Op. at 2, it cannot lie in equity. If Ms. Elem and Link & Smith no longer have the funds, they continue to be subject to legal claims, but the equitable claim has dissipated. AirTran's claims simply fall outside the relief permitted by 29 U.S.C. § 1132(a)(3)(B).

II. THE DISTRICT COURT IMPROPERLY GRANTED ATTORNEY'S FEES AND COSTS.

The defendants also challenge the District Court's grant of attorney's fees and costs. Under 29 U.S.C. § 1132(g), attorney's fees may be awarded at the Court's discretion to a party who achieves "some success on the merits." Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 255, 130 S. Ct. 2149, 2158 (2010). Because I view summary judgment as having been improperly granted in favor of AirTran, the District Court's related award of attorney's fees and costs should also be vacated. See Ogden v. Blue Bell Creameries U.S.A., Inc., 348 F.3d 1284, 1288 (11th Cir. 2003) (vacating award of attorney's fees after holding that the District Court improperly awarded equitable relief under ERISA).

III. DEFENDANTS' APPEAL OF THE DISTRICT COURT'S RULE 70 ORDER IS NOT MOOT AND THE RULE 70 ORDER WAS GRANTED TO ENFORCE AN INCORRECT JUDGMENT.

Finally, I turn to the defendants' appeal of the District Court's Rule 70 order enforcing judgment. The majority opinion dismisses the appeal as moot because defendants paid the required amount to AirTran, eliminating any "case or controversy about the merits of the Rule 70 order." Panel Op. at 21. I disagree with this holding on both factual and legal bases.

The defendants' payment to AirTran was conditioned in part on the outcome of the Rule 70 order appeal. The majority opinion highlights a purported stipulation by both parties at oral argument that the payments were subject to "the disposition of the appeal of the summary judgment and the award of attorney's fees and costs." Id. at 6. I heard no such stipulation at oral argument. AirTran's counsel admitted that the payment "was subjectively conditioned on repayment if there was a final ruling in favor of [defendants]," Oral Arg. Recording at 13:36 (Feb. 28, 2014), while counsel for defendants stated that the money was "turned over to other side to hold in trust" and that if "we win, we get it [back]," id. at 00:52, 01:09. At no point did the parties mention that conditional repayment was tied only to the appeal challenging summary judgment and award of attorney's fees and costs. This matters because defendants had two separate appeals before us: one challenging the summary judgment grant and award of attorney's fees and costs, Case No. 13-11738-BB, and the other challenging the Rule 70 order, Case No. 13-14912-BB. Everything I see indicates to me that defendants' payment was conditioned on the outcome of both appeals. For example, in their response to AirTran's motion for contempt, Mr. Link and

Link & Smith state that they "are paying the amounts claimed under protest and threat of civil and/or criminal contempt while the appeal of both Orders are pending in the 11th Circuit." Without explicit documentation or statements to the contrary, I see no basis for putting limitations on the defendants' conditional payment in our evaluation of mootness.

I do not read our prior case law to comport with the majority's analysis. While "payment of a judgment and an acknowledgement of satisfaction will moot an appeal from the judgment," RES-GA Cobblestone, LLC v. Blake Const. and Dev., LLC (Cobblestone), 718 F.3d 1308, 1315 (11th Cir. 2013), it is also true that "what matters is whether the parties' actions objectively manifest an intent to abandon the issues on appeal." Id. at 1315. In Cobblestone, we observed that the appellant "never purported to reserve the right to continue to pursue [the] appeal," did not intend to "claw back the costs and fees he paid," and signed a consent agreement settling the suit to determine that the appeal was mooted. Id. at 1315–16; see also Fidelcor Mortg. Corp. v. Ins. Co. of N. Am., 820 F.2d 367, 370 (11th Cir. 1987) (mooting appeal where appellant made "no reservation allowing [him] to proceed with an appeal"); cf. Alvarez-Perez v. Sanford-Orlando Kennel Club, Inc., 518 F.3d 1302, 1305–08 (11th Cir. 2008) (declining to dismiss an appeal as moot where the parties "acted in all respects as though the appeal and cross-appeal were alive and that they were awaiting a decision" and "continued to litigate the case in this Court as though nothing had changed"); Ass'n for Disabled Ams., Inc. v. Integra Resort Mgmt., Inc., 387 F.3d 1241, 1243 (11th Cir. 2004) (holding that an appeal was not moot where appellants "specifically reserved their right to appeal" and there was no "evidence of some intent to end the litigation"). Like the appellants in Alvarez-Perez, here

the defendants' "actions speak loudly enough to drown out" any indication that they regarded the conditional payment to terminate either of their appeals. 518 F.3d at 1307. Both parties briefed the Rule 70 order appeal after the payment was made to AirTran, and neither brief claimed mootness. The majority offers no evidence that the parties "objectively manifest[ed] an intent to abandon the issues" as is necessary by this Court's precedent.

The defendants' counsel made a statement at oral argument, only part of which is quoted by the majority to oppose the position I have taken here. See Panel Op. at 21. Though the attorney for Ms. Elem, Mr. Link and his law firm did say there was "perhaps not" a current injury resulting from that order, he went on to explain "but it could cause injury in the future such as having to come back up here again and fight that issue." Oral Arg. Recording at 02:58–03:06 (Feb. 28, 2014). Even accepting that counsel did not fully explain his clients' ongoing injury at that moment in the oral argument, the fact remains that, much like a supersedeas bond, defendants have an ongoing injury in the form of their conditional payment suspended in escrow.

The Rule 70 order appeal is not mooted by defendants' conditional payment made under threat of contempt. The District Court's grant of summary judgment improperly awarded non-equitable relief to AirTran in violation of 29 U.S.C. § 1132(a)(3)(B), thus an order enforcing that judgment cannot stand. Both the grant of summary judgment and the Rule 70 order should be vacated.

For these reasons I respectfully dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Nos. 13-11738 & 13-14912

AIRTRAN AIRWAYS, INC.,

Plaintiff-Appellee,

v.

BRENDA ELEM, MARK D. LINK, and LINK & SMITH, P.C.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
D.C. Civil Action No. 1:10-cv-03673-ODE

Before: WILLIAM PRYOR and MARCUS, *Circuit Judges*, and HONEYWELL,* *District Judge*.

Filed: December 2, 2014

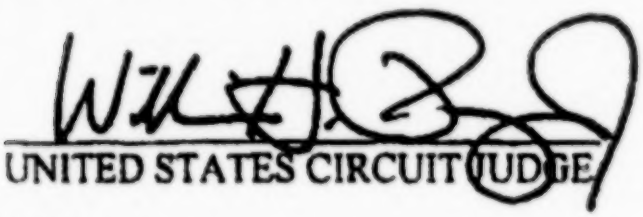
* Honorable Charlene Edwards Honeywell, United States District Judge for the Middle District of Florida, sitting by designation.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

ORD-42